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# Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power

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# Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power

JUDITH RESNIK\*

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## I. FROM THE REHNQUIST COURT TO THE REHNQUIST JUDICIARY

### *A. Developing New Norms*

A struggle over the norms and boundaries of federal judicial authority is ongoing, both within the United States Supreme Court and between the Court and Congress. That debate is taking place not only in the Court's high-profile constitutional docket but in ordinary cases and in work other than adjudication. The five-person majority that has become famous for its jurisprudence on the Commerce Clause, the Fourteenth Amendment, and sovereign immunity<sup>1</sup> has also revised the scope of federal equitable and common law powers. The emerging legal rules stem from cases—such as *Grupo Mexicano de Desarrollo, S.A., v. Alliance Bond Fund, Inc.*<sup>2</sup> and *Great-West Life & Annuity Insurance Co. v. Knudson*<sup>3</sup>—that may not come trippingly off the constitutional scholar's tongue but must be understood as working in tandem with the majority's restrictions on the power of Congress to develop new federal rights. These holdings instruct federal judges not to craft remedies without express congressional permission, and, when permission has been granted, to read it narrowly.

Moreover, through collective action unprecedented in the American experience, the Rehnquist Judiciary is attempting to convince Congress not to grant such permission. The Article III judiciary has become increasingly active in Congress before legislation is enacted—opining to Congress and the public about which litigants ought to be able to bring substantive claims to the federal courts.

Eighty years ago, Congress chartered a conference of circuit judges to meet under the leadership of the Chief Justice and—"in the interest of uniformity and expedition of business"—to "survey . . . the condition of business" of the federal courts.<sup>4</sup> Thus began an entity, novel for the United States, which provided a means for judges to coordinate and collaborate. As I detail in a brief history below, during its first decades, the Conference did not use its collective voice to comment on which litigants merited access to federal courts. Thereafter, the Conference occasionally advised against federal court remediation for certain kinds of cases.

A different posture has been adopted under the current Chief Justice. The Judicial

1. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999). The five in the majority are Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas. The dissenters include Justices Stevens, Souter, Ginsburg, and Breyer.

2. 527 U.S. 308 (1999).

3. 534 U.S. 204 (2002).

4. See Act of Sept. 14, Pub. L. No. 67-298, § 2, 42 Stat. 837, 838-39 (1922) [hereinafter 1922 Judgeship Act]. The current formulation, at 28 U.S.C. § 331 (2000) (discussed *infra* notes 280-311 and accompanying text), provides that the Judicial Conference survey the condition of business in the courts of the United States and requires the Chief Justice to "submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."

Conference has proposed that Congress hold a general presumption against creating new rights if enforced through federal courts. In the mid-1990s, through its first-ever Long Range Plan,<sup>5</sup> the Conference offered a vision of the appropriate allocation of power between state and federal systems and of the appropriate size and shape of the federal courts.<sup>6</sup> The Conference made some ninety recommendations, including this presumption against federal remediation.<sup>7</sup> The approach of the Long Range Plan is paralleled by commentary by the current Chief Justice, who has regularly used annual “state of the judiciary” addresses to criticize congressional decisions to empower particular kinds of litigants to appear in federal courts.<sup>8</sup>

Examining the Rehnquist Judiciary’s adjudication and advocacy together reveals a particular, and in some ways contradictory, delineation of the role for the federal judiciary: at once incompetent to help ordinary litigants who seek small-scale remediation through adjudication predicated on fact-filled records subject to appellate review, yet at the same time competent to use a collective voice to advise Congress on the shape of the rights that “the people” ought to have. These activities also illuminate the Rehnquist Judiciary’s view of congressional capacities. Through constitutional adjudication, the majority has disabled Congress from certain forms of generativity and innovation. Through statutory interpretations and judicial policy prescriptions, the majority has discouraged Congress from looking to federal courts as a means of enforcing national agendas. While others have identified the majority as claiming its supremacy<sup>9</sup> and assessed its political vision and its interpretative norms,<sup>10</sup> here I bring into focus the effects of the Rehnquist Judiciary on the daily experiences of lower tier judges, litigants, and members of Congress. The work of both judging and governing at the national level becomes impoverished.

### *B. Sources of Judicial Authority, Exercised Individually and Collectively*

This article both excavates the developing norms and analyzes them. Below, in Part II, I document the Rehnquist Judiciary’s stances towards rights and remedies through discussion and critique of two cases, *Grupo Mexicano* and *Great-West*, with opinions for the majority and dissent that track the now familiar 5-4 Supreme Court divide.<sup>11</sup>

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5. See JUDICIAL CONFERENCE OF THE U. S., LONG RANGE PLAN (1995), reprinted in 166 F.R.D. 49 (1996) [hereinafter LONG RANGE PLAN].

6. *Id.* at 21-39, reprinted in 166 F.R.D. at 81-89 (recommendations related to “Judicial Federalism”).

7. *Id.* at 28-29, reprinted in 166 F.R.D. at 88-89 (Recommendations 6). See *infra* Part III.B.

8. See *infra* notes 355-56.

9. See, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 1 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

10. See, e.g., Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Richard H. Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

11. These cases merit more attention than has been paid. *Great-West* has begun to be of concern to ERISA scholars and practitioners. See John Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West* (forthcoming, Jan. 28, 2003, manuscript on file with author); Colleen Medill, *The Supreme*

Both cases involved ordinary creditor-debtor problems. In both, lower court judges used their equitable authority to provide remedies for creditors. In both, the majority reversed, holding that federal judges lacked the power to respond to the particular claims of loss. In both, the majority rejected a conception of judicial authority evolving with new forms of commerce or with statutes calling for judges to use equitable powers. Instead, the majority insisted that contemporary federal judicial power be limited to those remedies which the majority believed to have been available in equity during the constitutional era. In these and other recent cases,<sup>12</sup> the Supreme Court's majority has crafted a narrow role for federal adjudication. When choices exist to imply or to enhance judicial power, the majority declines to make them.

In Part III, I turn to the statutes that authorize administrative judicial activities (such as the Judicial Conference) and the interpretative choices made about what falls within the judiciary's policymaking purview. As I explain, the text of the mandate for judicial collective action is ambiguous, and the legislative history is suggestive but not decisive of particular readings. Further, under the leadership of different chief justices, the practices and positions taken by the Judicial Conference have varied.

Given the statutory mandate and the examples of cribbed reading of statutes by the Court's current majority, one might expect a parallel narrow interpretation of the statutory charter for the Judicial Conference. Further, the majority's insistence on limited federal power is often linked to claims that judicial equitable power is suspect because it lacks democratic accountability. One might therefore also expect that Article III judges, serving in life-tenured, appointed positions—rather than as elected government officers—would approach their own institutional charter conservatively, refraining from using their collective authority as a springboard for commentary about whether legislators ought to craft new rights.

Yet, as I detail, the Rehnquist Judiciary has chosen an expansive posture, positioning itself as an advocate arguing generally against investing federal courts with obligations to enforce new rights. Sometimes on its own initiative and other times in response to congressional inquiries, the Judicial Conference has urged that Congress not admit specific sets of litigants to the federal courts.

### *C. Collective Advocacy and Judicial Independence*

I have two kinds of objections to these developments.<sup>13</sup> The first is about the legal

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*Court's New Federalism, ERISA Preemption, and the Future of Health Care in America* (forthcoming, on file with the author). Scholars of federal common law have also addressed *Great-West*. See Daniel J. Meltzer, Discussion at the AALS Federal Courts Symposium, (May 2002); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 59 [hereinafter Meltzer, *Judicial Passivity*]. *Grupo Mexicano* has not generated a sustained law review literature. The one major discussion comes from Professor Stephen Burbank. See Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000) [hereinafter Burbank, *The Bitter with the Sweet*], discussed *infra* note 121.

12. See *infra* notes 25-34 (discussing the implication of causes of action from the Constitution and from statutes).

13. Here I share the views of Barry Friedman, urging more frank engagement on the merits of the choices made. See Barry Friedman, *The Counter-Majoritarian Problem and the*

possibilities for national governance. I disagree with some specific positions taken by the governing body of the judiciary. Elsewhere, I have analyzed why the Constitution can be read to permit more national powers than the current majority finds and the Judicial Conference calls for in its Long Range Plan; I have also explained why proponents of new rights ought not to focus on national law as the only or central source of innovation.<sup>14</sup> I will not reargue these points here.

Rather, in Part IV, I focus on the other objection, based on concerns about the judicial role rather than on the merits of any particular position adopted. The new norms turn the judiciary into a strategic institutional actor, a role largely neglected in the literature on judging. Indeed, when public choice theorists address the judiciary, they typically model it as external to the special interests among which it mediates.<sup>15</sup> The idea

*Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 952-54 (2001).

14. See, e.g., Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) [hereinafter Resnik, *Categorical Federalism*]. In that essay, I disputed the claim, made by the majority in *United States v. Morrison*, 529 U.S. 598 (2000), that Congress lacked power to enact the civil rights remedy of the Violence Against Women Act, which had provided a new federal right to be free of violence animated by gender bias. As I detailed, constitutional and federal statutory rules shape the institution of marriage, define families, and attach economic and social effects to membership in families. But, as I also analyzed, a diverse set of efforts, at local, national, and international levels, are aimed at engendering greater equality between women and men. Thus, I questioned the wisdom of assuming that national legislation is the only or the most desirable route for long-term shifts in equality norms.

15. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. LAW & ECON. 875 (1975) (modeling judges as enforcing the agreements made by others); JOHN M. DE FIGUEIREDO & RUI J.P. DE FIGUEIREDO, JR., THE ALLOCATION OF RESOURCES BY INTEREST GROUPS, LOBBYING, LITIGATION, AND ADMINISTRATIVE REGULATION (Nat'l Bureau of Econ. Research, Working Paper No. 8981, 2002) (modeling courts, however, only in their adjudicative capacity).

Some discussions do focus on the preferences of individual judges. See, e.g., Richard Posner, *What Do Judges Maximize? The Same Thing as Everyone Else*, 3 SUP. CT. ECON. REV. 1 (1993); RICHARD POSNER, OVERCOMING LAW 109-144 (1995) (Ch.3, *What Do Judges Maximize?*). Both the book chapter and the essay discuss the "judicial utility function," which (Judge Posner argued) stemmed from the fact of fixed salaries, some interest in leisure, and preferences for prestige, avoiding reversal, achieving and maintaining reputation, having impact as a member of a multi-judge panel, and securing deference from others. See also Stephen M. Bainbridge & G. Mitu Gulati, *How do Judges Maximize? (The Same Way as Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002) (analyzing incentives to avoid complexity in this area of law); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CINN. L. REV. 615 (2000) (focusing on the motivations of extraordinary judges).

Others take up, and disagree about, the question of how panels of judges work together. See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (discussing whether decisions of three-judge panels vary depending on the composition including two judges appointed by Republicans or Democrats); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998) (disagreeing strongly with Prof. Revesz's view of the relevance of sources of appointments), and Richard L.

of the judiciary as a principal, acting on its own behalf to forward particular agendas, has yet to become a regular feature of their discussions.<sup>16</sup> Nor do many constitutional theorists regularly address the propriety of such collective action, although commentators rely on the concept of separation of powers to argue for special limitations on the exercise of federal adjudicatory power.<sup>17</sup>

But, as this article details, the judiciary has entered the policymaking sphere, weighing in on a wide range of topics. Here, I focus on one aspect: whether the judiciary ought to comment when Congress is contemplating enacting new causes of action, conferring rights of access to litigants not heretofore eligible for federal adjudication. My view is that the judiciary ought not take positions related to new federal rights—whether in support or in opposition of legislation creating access to the federal courts. Below, I sketch the argument for an institutionally restrained approach, seeking to sustain a judiciary responsive to litigants in specific cases but self-conscious about the boundaries of its own authority as a collective actor.

To preview my conclusions, conceptions of the judiciary as a faithful agent of Congress do not support judicial efforts to direct Congress about what new causes of action to create. Nor can the judiciary claim special expertise when opining about claims not yet in existence. While the judiciary may be able to bring knowledge to bear on its own staffing and other material needs, it cannot know—and has been shown to have predicted poorly—the demands that new causes of action will impose.<sup>18</sup>

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Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

Yet others focus on the dynamics that create the predicates for judicial institutions to be independent. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J. L. ECON. & ORG. 259 (1997) (both discussing the relative infrequency of independent judiciaries and the degree to which the structure of political governance, with frequent changes of parties in power, create incentives for independence). Still others address the interaction between courts and legislatures elaborating the meaning of statutes. See generally Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47 (2003) (discussing the variables affecting the congressional response to judicial decisions).

16. Two analyses do include a collective dimension look at the judiciary shaping federal rules of procedure. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (calling attention to the judiciary as a bureaucracy and arguing that, when shaping civil rules, judges will maximize their discretionary powers, their interest in remaining generalists, and their reliance on lawyers); Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rulemaking: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994) (questioning whether, in light of the nature of judges' incentives, the effects are substantial and calling for public choice theory to develop a richer theory of judicial preferences).

17. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), discussed *infra* notes 86, 89.

18. See discussion *infra* note 356 (discussing the difficulty of assessing the effects of potential legislation); discussion *infra* note 409 (detailing the predictions by the Administrative Office of the U.S. Courts in the early 1990s of the volume of filings and costs imposed by the then not-enacted Violence Against Women Act and the disparity between the tens of thousands of cases forecast and the fifty or so reported cases extant six years later when the

Further, using its collective voice to advise Congress on such policy matters enmeshes the judiciary in politics. Of course, judges are the by-product of politics. The Constitution stipulates a political process for the selection of life-tenured judges.<sup>19</sup> However, once individuals become judges, they can create conditions that enmesh or distance themselves from being perceived as political players, actively engaged in shaping social policy.

Here, a distinction between individual and collective action is important. Individual judges, cognizant of legal, ethical, political, and moral understandings of how a person (bearing the obligations of judgment) ought to behave, have decisions to make about what role to play in the world around them. Some judges may have special expertise, commitments, or passions, moving them to comment on or to work for certain social or political movements. To the extent such individuals do attempt to influence policy, whatever credibility and authority they have will make them more or less effective. Further, when they engage in behavior that appears partisan and that puts at risk their ability either to judge the merits of a particular case or to be perceived as unbiased, mechanisms exist for their recusal, disqualification, or sanction.<sup>20</sup> Thus, the involvement of individual judges in social policymaking may bring some benefits and does not impose grave institutional costs.

Less flexibility exists at the institutional level, however. While individual judges may be replaceable, the judiciary as a whole is not. The more enmeshed in policymaking, the more difficult it becomes for the institution to be seen as distant from partisanship. Further, when the official policymaking organ for the institution speaks, the positions taken gain status and have, in fact, produced results. The judiciary has succeeded in altering the texts of certain statutes.<sup>21</sup> Formal positions by the Judicial Conference also serve an educational function, socializing new members on what attitudes are seen to be appropriate for those who become judges.

In addition to affecting the substance of various legislation (whether for better or for worse) and the attitudes of judges, the Rehnquist Judiciary's chosen route—to become a visible advocate, repeatedly, on specific legislation proposing new federal rights—causes significant harm to the judiciary itself. The legitimacy of adjudication is

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constitutionality of the legislation was before the Supreme Court).

19. See Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003) [hereinafter, Geyh, *Judicial Independence, Judicial Accountability*] (arguing that, given the rarity of impeachment, democratic input occurs only at the time that life-tenured judges are appointed). See also Judith Resnik, *Statement and Testimony, The Senate's Role in the Confirmation Process: Whose Burden?: Hearings Before the Senate Comm. on the Judiciary, Subcommittee on Administrative Oversight and the Courts*, 107th Cong. 1st Sess. 179 (Sept. 4, 2001) (arguing that the Senate ought to take an active role in assessing the appropriateness of nominations), reprinted in 50 DRAKE L. REV. 511, 539-52 (2002).

20. See, e.g., Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002) (discussing the ethical and legal requirements for individual judges to recuse themselves, describing the psychological insights about implicit biases, and proposing additional means by which to recuse appellate judges).

21. Amendments to the 1984 Bankruptcy Act, discussed *infra* note 278, and the wording of the Civil Rights Remedy of the Violence Against Women Act, discussed *infra* notes 397 and 409, are two examples.



undermined when decisions reached through adjudication can be compared to the policies advocated, as the judiciary's positions are assessed to discern whether they accord or diverge from advocacy postures taken earlier.

Of equal concern, the judiciary becomes a place for lobbyists to go to enlist support for their special interests. Through choosing to become active in shaping legislative policy about rights holding, the Judicial Conference inevitably invites advocates to attempt to influence its positions. Over time, the conception of the judiciary as an institution apart from—and ill-at-ease in—politics diminishes. Many pressures already are at work that can undermine judicial independence.<sup>22</sup> Given its utility in enabling individual judges to enforce the rule of law even when at odds with popular sentiments, collective judicial advocacy ought to be avoided when possible.

The conveners of this Symposium provided the title "Congressional Power in the Shadow of the Rehnquist Court." I suggest a modest but important revision, for we write not only in the "shadow of the Rehnquist Court" but also in the broader shadow of the "Rehnquist Judiciary." Using the word "judiciary" helps to underscore that the activities requiring attention are not limited to opinions issued from the bench. The relevant literature includes the many statements made on behalf of the judiciary in addition to decisions rendered in court. Similarly, revision is needed of the phrases used to describe the various approaches taken by judges. "Judicial restraint," as contrasted with "judicial activism,"<sup>23</sup> is often claimed to be a desirable stance. But the current majority is aspiring to something more than judicial restraint, a posture more aptly termed "judicial disability." This phrase underscores the degree to which a powerful segment of the federal judiciary is forging a new, and disheartening, role for judges as they work on specific cases.

Further, when the Judicial Conference presses proposals to Congress about causes of action, the judiciary should be understood as "lobbying," a word occasionally used about, but not embraced by, the judiciary.<sup>24</sup> Lobbying is identified with interest group politics, and politics is an activity from which the Constitution has attempted to insulate the federal judiciary. However, when seeking to persuade Congress to adopt certain policies about how to implement substantive rights, the leadership of the judiciary cannot avoid becoming perceived as allied with some groups also engaged in

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22. See *Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (considering whether state ethical rules may limit the speech of candidates for judicial offices and discussing the challenges to judicial independence coming from both the election and selection of state and federal judges).

23. See generally William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (discussing the different kinds of decisions by courts that could be characterized as "activist" and which ones could be used to forward an agenda approved by conservatives); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L. J. 153, 191-237 (2002) (detailing responses, both popular and academic, to the Warren Court).

24. See, e.g., Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1 (1985); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L. REV. 163 (1992); John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 262 (1985).

convincing political officials of the correctness of a particular course of action. Further, the Judicial Conference spends the political capital of the Article III judiciary by affixing its imprimatur to certain choices.

Many of the specific decisions made by the Judicial Conference may appear innocuous or affirmatively useful, in light of a particular situation. By using the term "lobbying," I hope to give proponents of such efforts pause so that they might reflect on how the sum total of the many instances of position-taking can affect the institution of the judiciary. Article III judges, equipped with life-tenure, exercise a specific form of governmental power. As they move further into the political advocacy sphere, they make the federal judiciary resemble other government agencies, pursuing policy goals. Aware that they enjoy unusual powers as life-tenured government office holders, Article III judges ought to be especially conservative about giving collective voice to policy prescriptions on how to shape enforcement of rights in this nation.

## II. POLICING BOUNDARIES: REFRAMING THE POWER OF FEDERAL JUDGES BY DISABLING THEIR REMEDIAL CAPACITIES

Through a series of decisions, the majority is developing a new theory of limitations on the equitable powers of the federal courts. Just as those steeped in the jurisprudence of federal constitutional law can recount, at least in retrospect, how two decades of developments in the law of habeas corpus, sovereign immunity, the Commerce Clause, and the Fourteenth Amendment interacted to limit rights,<sup>25</sup> one can now discern the outlines of another trajectory, imposing comparable restrictions at the subconstitutional level on what judges can do in cases often termed ordinary.<sup>26</sup>

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25. For example, in the 1977 decision of *Wainwright v. Sykes*, 433 U.S. 72 (1977), Justice Rehnquist limited the ruling of *Fay v. Noia*, 372 U.S. 391 (1963), by permitting prisoners to forfeit their federal habeas claims through decisions made by their lawyers. Thereafter, *Fay*'s demise was accomplished in *Coleman v. Thompson*, 501 U.S. 722 (1991). A parallel can be found in his decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), linking congressional authority to override sovereign immunity to the Fourteenth Amendment. That approach progressed through *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), to the majority's ruling in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), concluding that the Commerce Clause did not provide Congress with the power to abrogate states' immunity from suit. That legal turn made congressional powers under the Fourteenth Amendment all the more important. But thereafter, congressional powers under the Fourteenth Amendment were clipped by the majority in *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). See generally Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 2, 2002, at A1 (describing his thirtieth year on the bench as the one in which the Court "moved far toward accomplishing" the Chief Justice's "long-term goals," including "expanding the concept of sovereign immunity"; also discussing that he had pursued his "constitutional vision" since his graduation from law school fifty years ago).

26. See also Fallon, *supra* note 10, at 452-68 (exploring other areas, including sovereign immunity, the doctrine of independent and adequate state grounds, and abstention, as part of a "quiet front" in need of attention); Meltzer, *Judicial Passivity*, *supra* note 11 (elaborating on the Court's use of federal common law); David M. Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 849 (1999) (focusing on *United States v. Dixon*, 509 U.S. 688 (1993), as an example of Justice Scalia's "hostility toward contempt power" and his "general distrust of

One aspect of the problem that has drawn attention comes within the frame of "implied causes of action," both constitutional and statutory. Beginning in the 1960s and continuing for more than a decade, the Supreme Court adopted a stance that federal courts had the power to infer remedies—including private causes of action for either injunctive or monetary relief—from the Constitution itself<sup>27</sup> and from statutes otherwise silent about private enforcement.<sup>28</sup> The underlying premises of such rulings were that rights were predicates for remediation and that courts were supposed to respond to claims of wrongdoing. Thus, absent positive indications that federal adjudication would interfere with congressional or state remedies, courts could imply causes of action on behalf of individuals seeking to enforce constitutional or statutory provisions.<sup>29</sup>

However, under the Rehnquist Judiciary, the approach shifted. Several cases illustrate, at both constitutional and statutory levels, the new analysis—refusing litigants entry to the federal courts. For example, in *Correctional Services Corp. v. Malesko*,<sup>30</sup> a federal prisoner in a facility operated by a private entity was left without federal constitutional redress against the corporation for injuries suffered by alleged inattention to his known medical needs.<sup>31</sup> In the statutory context, *Gonzaga University*

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expansive judicial powers," *id.* at 903).

27. *Carlson v. Green*, 446 U.S. 14 (1980) (implying from the Eighth Amendment a right of a federal prisoner to bring a damage action for deliberate indifference to his known medical needs); *Davis v. Passman*, 442 U.S. 228 (1979) (implying from the Fifth Amendment the right to seek damages against a congressman, alleged to have discriminated against the plaintiff as an employee because she was a woman); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying from the Fourth Amendment the ability of an individual, subjected to an allegedly illegal search and not subsequently charged with a crime, to bring a damage action against federal officials). Had defendants in these lawsuits been acting under the color of state law, then they might have been subjected to liability through civil rights statutes such as 42 U.S.C. § 1983. No such comparable general provision applies to federal actors.

28. *See, e.g., Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (implying a cause of action under Title IX of the Education Amendments of 1972); *Cort v. Ash*, 422 U.S. 66 (1975) (finding that the particular securities law did not permit such a private damage action). *Cort v. Ash* provided a test that permitted implication of private damage rights from federal statutes if a plaintiff fell within the class for whose benefit a statute was enacted; a private right of action was consistent with the legislative purpose; no evidence existed that the legislature sought to preclude implication; and implication would not intrude on arenas of particular concern to states.

29. *See Cort*, 322 U.S. at 78. Judges thus retained discretion to interrogate particular statutory schemes and their interaction with other laws.

30. 122 S. Ct. 515 (2001).

31. The Chief Justice wrote the majority decision, circumscribing the earlier decisions recognizing constitutional remedies. *Id.* at 522-23 (also arguing the availability of other remedies, including actions against the individual officers and prison grievance mechanisms). Justice Scalia concurred to argue that such remedies were "a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . [now] abandoned." *Id.* at 524-25 (Scalia, J., concurring, joined by Justice Thomas). The four dissenters, in an opinion written by Justice Stevens, objected to the imposition of "notions of sound policy" in lieu of exercising "the duty . . . to apply and enforce settled law." *Id.* at 528 (Stevens, J., dissenting, joined by Justices Souter, Ginsburg, and Breyer).

*v. Doe*, a case about the privacy of student academic records,<sup>32</sup> the majority concluded that, absent specific directives from Congress, no private rights of action would be inferred.<sup>33</sup> In addition, the Court announced that no implied rights of action could be enabled by 42 U.S.C. § 1983.<sup>34</sup> Rather, “if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms . . . .”<sup>35</sup> Similarly, in *Alexander v. Sandoval*,<sup>36</sup> the majority concluded that regulations promulgated pursuant to Title VI were not enforceable by individual litigants.

One might view such decisions, at least in the statutory context, as examples of the Court’s preference for Congress to be the central source of both rights and remedies. Moreover, by implying causes of action, federal courts give litigants access to federal adjudication. Again, the Court’s actions can be explained as evidence of its preference for congressional judgments on the jurisdictional question. But, even when litigants are properly before the federal courts because of diversity jurisdiction or by virtue of a federal cause of action expressly provided by Congress, the 5-4 majority deploys the same analytic approach, presuming prohibitions on judicial remediation to defeat

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32. *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268 (2002) (holding that an alleged violation of the federal statute did not permit a private action for damages). The Chief Justice wrote for the Court, in an opinion joined by Justices O’Connor, Scalia, Kennedy, and Thomas. The student had won more than a million dollars in damages in a jury decision in state court on a claim that, because of an investigation based on rumors that were not disclosed to him, he would not be given a certification of good moral character—needed to obtain teaching positions in public schools. *Id.* at 2269.

33. *Id.* at 2277 (summarizing earlier precedents as mandating that “where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action”). See also *Barnes v. Gorman*, 122 S. Ct. 2097 (2002) (refusing to permit the award of punitive damages in private actions brought under the Americans with Disability Act and the Rehabilitation Act); *Suter v. Artist M.*, 503 U.S. 347 (1992) (declining to imply a cause of action under the Adoption Assistance and Child Welfare Act of 1980). In *Barnes*, Justice Stevens, joined by Justices Ginsburg and Breyer, concurred in the judgment but objected to the “expansive basis asserted” by Justice Scalia’s majority opinion in precluding punitive damages. *Barnes*, 122 S. Ct. at 2103-05. Justice Souter, joined by Justice O’Connor, filed a separate concurrence, agreeing that the majority had correctly used the analogy of the common law of contract to conclude that damages were unavailable under the statute but reading the Court’s opinion as recognizing that the contract-law analogy might not give clear answers to other questions interpreting remedies under statutes passed under the Spending Clause. *Id.* at 2103.

34. “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.” *Gonzaga*, 122 S. Ct. at 2275.

35. *Id.* at 2279. Justice Breyer, joined by Justice Souter, disagreed with this presumption. They concurred that the particular statute at issue could not serve as the basis for private redress. *Id.* at 2279-80. Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the statute created an enforceable right and objecting to the Court’s “novel attempt to craft a new category of second-class statutory rights . . . .” *Id.* at 2280-86. Specifically, the dissenters objected to imposing the requirement that, when Congress wanted enforcement pursuant to § 1983, it had to so specify. *Id.* at 2284-86.

36. 532 U.S. 275 (2001). Justice Scalia wrote the majority opinion. *Id.* at 278. The dissent, written by Justice Stevens, was joined by Justices Souter, Ginsburg and Breyer. *Id.* at 293 (Stevens, J., dissenting).

plaintiffs' claims.

*A. A Dearth of Equitable Powers, If Unknown in 1789: Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*

A first example comes from the decision of *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*<sup>37</sup> A creditor—Alliance—sought an injunction to prevent the dissipation of assets while it pursued its contractual rights for money damages. Alliance had invested in Grupo Mexicano de Desarrollo (“GMD”), a holding company for a group of construction firms located in Mexico and involved in building roads.<sup>38</sup> Subsequently unable to meet its obligations, GMD restructured its debts by assigning priority in specific notes to the Mexican government and other creditors.<sup>39</sup>

Invoking the diversity jurisdiction of the federal district court, Alliance brought an action to collect damages for an alleged breach of contract. As an interim measure, Alliance requested a preliminary injunction to freeze GMD’s assets.<sup>40</sup> Through affidavits, GMD conceded that, by assigning assets to competing creditors, it had left less than six million dollars to satisfy \$75 million dollars of debt owed the Alliance investors.<sup>41</sup> After two hearings, the district judge found that Alliance was at risk of irreparable harm. The court concluded that Alliance would “almost certainly” prevail on the merits but, by then, the defendants’ assets<sup>42</sup> would be insufficient to pay the judgment.<sup>43</sup> Deciding that its final judgment would likely be worthless unless it acted, the court enjoined the transfer of assets but specifically did not preclude GMD from declaring insolvency.<sup>44</sup>

The Second Circuit agreed that, in the absence of an injunction, the resulting judgment would likely be uncollectible against a debtor whose actions the court characterized as “less than benign.”<sup>45</sup> As for the source of the power to protect the creditor, the Second Circuit considered two federal procedural rules. One, Rule 64, authorized use of remedies available under state law “for the purpose of securing satisfaction” of judgments.<sup>46</sup> The other, Rule 65, provided for preliminary injunctive

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37. 527 U.S. 308 (1999).

38. *Id.* at 310-11.

39. *Id.* at 311-12.

40. *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 691-92 (2d Cir. 1998).

41. *Id.* at 692.

42. *Grupo Mexicano*, 527 U.S. at 312-13.

43. *Grupo Mexicano*, 143 F.3d at 692 (summarizing the district court’s conclusions). *See also* Petition for Certiorari at Appendix 26a, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (No. 98-231) (including the order dated Dec. 23, 1997 from the Southern District of New York that had granted the preliminary injunction based on a finding that “the probability that Plaintiffs will succeed on the merits of their underlying claim for breach of contract is almost certain . . .”).

44. Brief for Respondent at Joint Appendix 79aa, *Grupo Mexicano* (No. 98-231) (including the transcript of the district court proceedings).

45. *Grupo Mexicano*, 143 F.3d at 697.

46. FED. R. CIV. P. 64 (providing that, after an action is commenced, “all remedies . . . for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by

relief.<sup>47</sup> The Second Circuit saw the two as “complementary, not mutually exclusive.”<sup>48</sup> While the parties agreed that New York law did not provide for a freeze order,<sup>49</sup> making Rule 64 unhelpful, the Second Circuit determined that federal “general equitable power”<sup>50</sup> could provide relief if the exacting requirements for a preliminary injunction relief were met.<sup>51</sup>

The Supreme Court reversed through a decision split 5 to 4.<sup>52</sup> The majority opinion, written by Justice Scalia, concluded that because the remedy would not “historically” have been available from a court of equity, the district court had no power to prevent the disposition of assets pending adjudication.<sup>53</sup> Below, I examine the analytic choices that generated this conclusion.

### 1. Requiring English History

The majority’s decision assumed that federal equitable powers stemmed from Congress. Focusing on the 1789 congressional grant of jurisdiction to the federal courts over “all suits . . . in equity,” the majority read that provision to permit only those remedies available during the constitutional era.<sup>54</sup> The majority rejected the dissent’s argument that the “grand aims of equity” then entailed a flexible approach, open to development as necessitated by circumstances.<sup>55</sup> The majority also rejected the dissent’s argument that later American precedents proved the existence of a federal equity power broader than that of England.<sup>56</sup> Justice Scalia’s opinion distinguished such cases as resting on independent statutory authority<sup>57</sup> or on special public

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the law of the state in which the district court is held,” and referring to attachment, garnishment, or “equivalent remedies, however designated”).

47. FED. R. CIV. P. 65.

48. *Grupo Mexicano*, 143 F.3d at 692.

49. *Id.* at 693.

50. *Id.* at 695-96.

51. As to a bond, the trial judge had required the posting of \$50,000, a small sum given the amount of debt at issue but perhaps illuminating the trial judge’s confidence in the likelihood that the plaintiff would prevail. See Brief for Respondent at 5, *Grupo Mexicano* (No. 98-231).

52. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). Justice Scalia wrote for the majority formed by the Chief Justice, Justices O’Connor, Kennedy, Thomas, and himself. *Id.* at 309. Justice Ginsburg issued the dissent, joined by Justices Stevens, Souter, and Breyer. *Id.* The decision was unanimous in one respect, that the issuance of a permanent injunction had not rendered the controversy moot because, if as claimed, the issuance of the preliminary injunction was wrongful, GMD would be able to recover on the bond. *Id.* at 315, 335 n.2.

53. *Id.* at 333. For those accustomed to the historical approach invoked by Justice Scalia in cases involving the Due Process Clause, the discussion was familiar for its focus on early practices. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604 (1990) (Scalia, J., plurality opinion) (holding that personal jurisdiction obtained by personal service within the forum state comported with due process requirements because that method had been available historically).

54. *Grupo Mexicano*, 527 U.S. at 318-19 (as excerpted in the majority’s decision).

55. *Id.* at 321-22, 342 (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer).

56. *Id.* at 337.

57. *Id.* at 324-25 (discussing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940),

interests.<sup>58</sup>

As is familiar to those steeped in Justice Scalia's craft, a good deal of rhetorical flourish was deployed in service of these claims. Like parallel developments in sovereign immunity cases that also constrain the remedial powers of the federal courts,<sup>59</sup> the opinion insisted that it had only applied (rather than created) a rule. As Justice Scalia explained, the ruling was consistent "with the democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence."<sup>60</sup> Further, the majority positioned itself as preventing errant judges from harmful overreaching. Justice Scalia repeated a commentator's characterization of a freeze-asset injunction as a "nuclear weapon."<sup>61</sup> And Justice Scalia quoted Justice Story about the horrors of English equity, "the most formidable instrument of arbitrary power, that could well be devised."<sup>62</sup>

## 2. Insisting on Courts as Agents

The *Grupo Mexicano* majority presumed federal judges incompetent to shape new remedies unless so directed by statute. That decision shares an intellectual kinship with a position that its author, Justice Scalia, has expressed in lectures—what he has termed the "uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers)."<sup>63</sup> Further, for Justice Scalia, "in the federal courts . . . there is no such thing as common law. Every issue of law I resolve as a federal judge is an interpretation of a text—the text of a regulation, or of a statute, or of the Constitution."<sup>64</sup>

Thus, the consideration of federal courts' remedial powers implicates the constitutional meaning of allocated powers. The constitutional word "court" has not

and the Securities Act's provisions for equitable relief).

58. *Id.* at 325-26 (quoting *Virginia Ry. Co. v. Ry. Employees*, 300 U.S. 515, 552 (1937)) (distinguishing *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965)). See discussion *infra* Part II.A.6 (discussing the majority's assertion that federal courts may have broader equitable powers when public interests are at stake).

59. See generally Daniel Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000) [hereinafter, Meltzer, *State Sovereign Immunity*]; Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

60. *Grupo Mexicano*, 527 U.S. at 332.

61. *Id.* at 329, 332 (quoting RICHARD N. OUGH & WILLIAM FLENLEY, *THE MAREVA INJUNCTION AND ANTON PILLER ORDER: PRACTICE AND PRECEDENTS* xi (2d ed. 1993)). See *infra* notes 124-128 and accompanying text (discussing *Mareva* injunctions).

62. *Grupo Mexicano*, 527 U.S. at 332 (quoting 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 19 (Boston, Little, Brown & Co. 1886)) (also describing equity as placing "the whole rights and property of the community under the arbitrary will of the Judge").

63. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, address given at Princeton University (Mar. 8-9, 1995), in *THE TANNER LECTURES ON HUMAN VALUES 1995* at 86, available at <http://www.tannerlectures.utah.edu/library.html> [hereinafter Scalia, *Common-Law Courts*].

64. *Id.* at 88. Justice Scalia there noted that "a qualification so small" existed but did "not bear mentioning."

(yet) prompted a literature comparable to that devoted to the constitutional word "case,"<sup>65</sup> but the reference to "the judicial power" has brought forth sustained consideration about what kinds of powers were meant to be included (then) and what to make of those words (then and now).<sup>66</sup> Much of that discussion seeks to understand how judges ought to read statutes. In addition, scholars of the federal courts have many times addressed federal common law,<sup>67</sup> a discussion that expanded in light of the 1938 decision of *Erie Railroad Co. v. Tompkins*,<sup>68</sup> which prohibited federal rules of decision in cases arising under state law.<sup>69</sup>

How might one reason about the charter that runs with the job of judge? Does the conception of a judge shift if modified by the word "federal"? One might derive theories of role from practice, by looking at what judges in fact do. In those terms, the claim that federal judges do not "do" common lawmaking ignores many examples of that genre of decisionmaking. Illustrations include cases about relations with other

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65. See, e.g., Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 277 (1990); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

66. See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*]; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998); Manning, *supra* note 17. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203 (2001).

Commentators also address courts' inherent or supervisory powers and the degree to which Congress may or should regulate such powers. See, e.g., Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997).

67. See, e.g., Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513 (2002) [hereinafter Meltzer, *Customary International Law*]; Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

68. 304 U.S. 64 (1938).

69. See, e.g., John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427 (1958). The Erie-based argument that federal courts lack common law powers has sometimes been read contextually to mean that federal courts cannot make common law only in those cases that arise under state law. Proponents of this position, such as Professor Martha Field, also detail the many instances of federal common law making to undercut the argument that federal courts are incompetent to develop law. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986). Moreover, given the murky bases of the decision in *Erie* itself (which lacks specificity on what exactly was unconstitutional), it may itself be an example of a genre of federal common law making. My own view is that Article III's jurisdictional bases, including diversity, support authority for judge-made law but that judges may well decline to develop law based on principles of comity, such as deference to state or legislative lawmaking. See Meltzer, *Customary International Law*, *supra* note 67.



nations,<sup>70</sup> commercial transactions with the United States,<sup>71</sup> labor law,<sup>72</sup> admiralty,<sup>73</sup> and statutes of limitations.<sup>74</sup> Indeed, Justice Scalia is himself the author of a major contemporary federal common law decision, creating a federal defense of immunity for government contractors despite congressional inaction on statutes proposing such defenses to liability.<sup>75</sup>

Alternatively, Justice Scalia's claim might be aspirational—that judges should do as little common law making as possible. Justice Scalia's concern about a democratic deficit for judge-made law would seem to include all judges,<sup>76</sup> although in some cases, he has appeared to draw distinctions between federal and state judges.<sup>77</sup> If the argument is that federal judges ought to do little (and possibly less than their counterparts in other jurisdictions), it would be based either on some reading of the Constitution, or on historical practices, or on a view that conditions now require situating federal judges as specially limited.

Starting with the textual reference in Article III to "courts," we know that courts—unlike some other institutions created by the Constitution—were familiar to the Framers through experiences with English, colonial, and fledgling state courts. The Constitution designed a distinctive court system and stipulated special attributes for judges in federal courts—such as life-tenure, guaranteed salaries, and competency over certain subject matters. But the Constitution did not generate a novel iteration of courts

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70. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

71. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

72. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

73. *Norfolk Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811, 820 (2001). *See generally* Joel K. Goldstein, *Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange*, 43 ST. LOUIS U. L.J. 1337 (1999).

74. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975).

75. *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). *See also* *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (holding, in an opinion written by Justice Scalia for a unanimous Court, that federal law governed preclusion of federal judgments, and that federal law required the use of state law in a state-based claim unless that law was incompatible with federal interests). *See generally* Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027 (2002).

76. *See* Scalia, *Common-Law Courts*, *supra* note 63, at 121 ("the interpretation and application of democratically adopted texts comprises virtually all the work of federal judges, and the vast majority of the work of state judges"). If the problem is framed as the absence of democratic input into the resolution of an individual decision that "makes" a rule of law, electing judges (as some states do) would not solve it.

77. *See Republican Party of Minn. v. White*, 122 S. Ct. 2528 (2002) (holding that Minnesota's restrictions on candidates for the judiciary were overbroad). The same five members of the Court formed the majority that struck Minnesota's rules, and Justice Scalia wrote the opinion for the Court in which he stated that "state-court judges possess the power to 'make' the common law." *Id.* at 2539. Both Justices O'Connor and Kennedy filed their own concurrences. *Id.* at 2542, 2544, respectively. In dissent, Justice Ginsburg (on behalf of herself and Justices Stevens, Souter, and Breyer) quietly departed from the majority's distinction between state and federal judges as to their common law powers. The dissent did so by not distinguishing between state and federal judges when stating that judges have the power to "develop common law or give concrete meaning to constitutional text." *Id.* at 2551.

with practices and remedial authority radically divergent from other jurisdictions' courts.<sup>78</sup>

Indeed, we know that practices of other courts influenced both the provisions of the First Judiciary Act and the methods and rulings of early federal judges. In 1789, Congress required lower federal courts to align themselves with state courts' practices, at first in a static fashion but subsequently in a dynamic manner.<sup>79</sup> And, through many histories of the early period,<sup>80</sup> we know that federal courts generated decisions shaped by the demands of adjudication and the political exigencies of the time.<sup>81</sup> Moreover, in the early period, neither law nor practices came pre-coded as "state" or "federal" or "English" or "American."<sup>82</sup> Only through jurisdictional struggles, provisions for

78. *But see* Pushaw, *supra* note 66 at 738-47 (arguing that three "basic" constitutional principles—of a written constitution with enumerated powers, of lawmaking by the legislator, and of congressional control over the judiciary's structure—require the judiciary to use only those inherent powers essential to executing the laws and to forego those powers which, while "helpful, useful, or convenient" are not essential to the work).

79. *See* Conformity Act of 1872, Ch. 255, 17 Stat. 196; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 930-31 (1987).

80. *See, e.g.,* MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816* (1978); Susan L. Block & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549 (2002); Wythe Holt, "Federal Courts as the Asylum to Federal Interests": *Randolph's Report, the Benson Amendment, and the "Original Understanding" of the Federal Judiciary*, 36 BUFF. L. REV. 341 (1987); Wythe Holt, "To Establish Justice": *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421. Whether to use early practices to ascribe meaning to Article III is a question about which scholars disagree. *See* ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992) and specifically Maeva Marcus & Natalia Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in *id.* at 13-39.

81. Stewart Jay, for example, has examined the question of why, in 1793, five Supreme Court justices, invoking separation of powers, declined the Executive's request for advice on the obligations of the United States as a neutral in the European Wars. *See* STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 1-9 (1997). Professor Jay documented English judges' roles in drafting particular statutes, *id.* at 10-50, as well as the many functions performed by early American judges and justices, *id.* at 57-112. He concluded that the decision to refuse to provide advice on constitutional questions was a choice, driven by the particular confluence of the political views and affiliations of justices and their concerns about protecting other decisions. *Id.* at 171-77. In general, he argued that the claimed prohibition on advisory opinions, now "an abstraction" allegedly compelled by Article III, in fact grew from "particular circumstances, rather than abstract principles." *Id.* at 176-77.

82. William Fletcher has looked at case law in the early days of the federal system and shown that, at least in certain areas, judges successfully created, administered, and saw themselves guided by a shared common law, neither state nor federal. *See* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984). *See also* Eskridge, *All About Words*, *supra* note 66, at 1043 (invoking, in response to a critique that federal courts would displace state law, James Iredell's comment that "common law would remain the baseline of Americans' duties and rights, subject to lawful statutory alterations"); *id.* at 1058-87 (discussing federal court reliance, in the first fifteen years of decisions, on the "law of nations").

separate rules of practice and procedure, and advocacy—from judges, politicians, lawyers, and law professors—have we come to develop a jurisprudence that insists on bodies of law as “state” or “federal.”<sup>83</sup>

The constitutional charter for “courts” with jurisdiction “in law and equity” can thus be read to authorize institutions that, like other countries’ courts, have the capacity to respond to changing demands, so long as federal courts work within the boundaries of their subject matter authority.<sup>84</sup> The history of the federal courts is filled with examples of decisions in which judges extrapolated meanings and provided remedies beyond the text of statutes.<sup>85</sup> Specifically in terms of equity, both Professor William Eskridge (focused on the early periods)<sup>86</sup> and Professor John Leubsdorf (concerned about

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83. See Resnik, *Categorical Federalism*, *supra* note 14, at 619-26, 642-57.

84. As to what was intended then, see Eskridge, *All About Words*, *supra* note 66, at 1044 (discussing the shared understanding in England and in the United States that, when judges offered equitable interpretations of statutes, they were not engaged in illicit lawmaking or exercising inappropriate discretion). Further, even Robert Pushaw, an opponent of many implied and inherent powers, offers the view that neither the text of the Constitution nor discussion at the Convention or during ratification addressed the inherent powers of courts. Rather, theories of constitutional structure are required to develop normative approaches to what might have been intended then and what ought to exist now. See Pushaw, *supra* note 66, at 822.

85. See David A. Strauss, *The Common Law Genius of the Warren Court*, 2002 U. CHI. PUB. L. & LEGAL THEORY RES. PAPER SERIES 25, available at [http://papers.ssrn.com/abstract\\_id=315682](http://papers.ssrn.com/abstract_id=315682) (arguing that common law caution coupled with careful innovation marked the jurisprudence of that era).

86. Professor William Eskridge has reviewed English, early state, and early federal cases and distinguished the kinds of judicial contributions made for the “unprovided-for case.” Eskridge, *All About Words*, *supra* note 66, at 995-97. For example, he noted an English case in which a statute specified property transfers that could be disregarded if used to avoid the king’s seizure of church property. A court, dealing with an unlisted method for transferring property, concluded that its role was to “suppress the mischief, and advance the remedy . . .” *Id.* at 1004 (quoting *Heydon’s Case*, 76 Eng. Rep. 637, 638 (Ex. 1584)). See also *id.* at 1004-14 (considering other instances of equitable interpretation to advance statutory ends and finding no evidence of the “follow-the-words-notwithstanding the consequences approach” in federal cases, and only once in state cases). The most controversial judicial practices in early America, he concluded, were those which he terms “suppletive.” Some commentators feared that such exercises of judicial power would come at the expense of either the powers of the states or the liberties of individuals. *Id.* at 996-97.

Professor Eskridge’s article is part of an ongoing debate about the role of judges, and was written in response to Professor John Manning, who has disagreed in many respects with Professor Eskridge. *Id.* at 992-94. Professor Manning has argued that English judges did upon occasion see themselves as having a broad charter to interpret Parliamentary directives; they relied in part on the doctrine of “equity of the statute.” But, in his view, that approach “does not translate well” to the United States, which deliberately departed from many of the features that characterized the English relationship between the judiciary and the executive. Manning, *supra* note 17, at 1, 6-8, 71-105. Manning claimed that the “faithful agent” model provided a more accurate description of how early Americans hoped their federal judges would behave and of how those judges did in fact rule. Further, he argued, it fit the political theory of separation of powers adopted by the United States Constitution. *Id.* at 58, 121-24. Although Manning disagreed with Eskridge about what judges ought to do, Manning concurred with Eskridge that, in the early precedents, federal judges did not only match their actions to statutes authorizing

awards of preliminary injunctive relief)<sup>87</sup> have demonstrated that federal judges repeatedly responded to litigants' claims through devising remedies other than those stipulated in statutes and rules.

Thus, *Grupo Mexicano* is less about constitutional text and practice and more about establishing a new and distinctive charter for federal judges—based on a normative theory of how judges ought to behave. That position might well be predicated on a view that, given the many changes in both courts and legislatures since the founding,<sup>88</sup> new solutions are required. Among competing theories, the majority has chosen the model of judges as “faithful agents,” constrained absent congressional direction to remediate.<sup>89</sup> Implicitly, the majority has rejected conceptions of a “cooperative partnership” between judges and Congress, sharing in the undertaking of lawmaking, or a more eclectic approach, open to shifting roles depending on the context.<sup>90</sup> The *Grupo Mexicano* ruling, one of several limiting affirmative federal remedies, fits within a series of opinions written by Justice Scalia—on contempt powers,<sup>91</sup> on the lack of historical precedent for certain kinds of injunctions,<sup>92</sup> and on the limits that federal rules impose on the inherent powers of judges.<sup>93</sup> One might be tempted to call *Grupo Mexicano*'s holding an example of common law making itself<sup>94</sup> but for its failure to build on or to explain its departure from precedent. Instead, the majority

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particular remedies. See Eskridge, *All About Words*, *supra* note 66, at 1096-1100; Manning, *supra* note 17, at 87-88.

87. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) (discussing both state and federal cases, as well as English practice, and arguing that “dizzying diversity of formulations” existed, in contrast to more recent efforts to craft a single standard).

88. As many have explained, however, the judiciary and Congress now are different on so many dimensions that the historical inquiry itself may be misguided. See, e.g., Eskridge, *All About Words*, *supra* note 66, at 1087-1106; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 933-49 (2000) [hereinafter Resnik, *Trial as Error*].

89. Manning, *supra* note 17, at 5-22, 102-05. See also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 130-39 (1998) (arguing that federal courts lack the power to fashion a common law for administrative adjudication but must rely solely on the APA). This approach would result in limiting development of the common law of due process in administrative processes.

90. See Eskridge, *All About Words*, *supra* note 66, at 991-92 (objecting to the dichotomous formulation of a judiciary as either agent or partner because it misses both theory and practice and arguing that the role of judges in statutory interpretation ought to vary, sometimes coming closer to the judge as faithful agent and other times as a cooperative partner).

91. See, e.g., *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 816-17 (1987) (Scalia, J., concurring) (arguing that only the executive branch had the authority to decide to prosecute contempt).

92. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 839-44 (1994) (Scalia, J., concurring) (arguing that modern injunctions departed from historical equity practices).

93. See *Carlisle v. United States*, 517 U.S. 416 (1996), discussed *infra* notes 98-104. See also *Dickerson v. United States*, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting, joined by Justice Thomas) (objecting to the majority's upholding of *Miranda* warnings as a “boundless doctrine of judicial empowerment”).

94. As noted, Justice Scalia wrote one of the leading recent common law opinions, licensing a federal defense for government contractors. See *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

created new, and atextual, constraints on the federal judicial role.

### 3. Reading Federal Rules as Prohibitions

In *Grupo Mexicano*, Justice Scalia suggested another source of judicial constraint—the text of federal rules. Justice Scalia noted that, while none of the participants had raised the point, a federal rule dealing with joinder of claims did not specifically authorize preliminary relief when monetary damages were sought.<sup>95</sup> The issue was not dispositive, given that it had neither been considered nor briefed below.<sup>96</sup> But the majority commented that Rule 18's silence (like the silence of statutes) implied a bar to judicial provision of remedies.<sup>97</sup> That approach posits that, when federal rules codify and structure practices, the rules eliminate flexible response to the particulars of a given case.

Although dicta in *Grupo Mexicano*, the lack of a federal rule's textual directive has formed the basis to limit trial judges' authority in other cases. For example, in *Carlisle v. United States*,<sup>98</sup> a district judge concluded that a criminal defendant was legally innocent of a crime for which a jury had convicted him.<sup>99</sup> Rule 29 of the Federal Rules of Criminal Procedure authorized defense counsel to move to set aside verdicts within seven days.<sup>100</sup> A defendant's lawyer missed the deadline by a day. The trial court reasoned that "no prejudice" resulted to the Government from treating the motion as timely filed and that a refusal to hear the motion would result in "grave injustice."<sup>101</sup>

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95. See FED. R. CIV. P. 18(b) (a "plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money.").

96. As the Court noted, the issue of fraudulent conveyances was not involved in the case. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 324 n.7 (1999).

97. *Id.* at 324.

98. 517 U.S. 416 (1996).

99. Transcript of Sentencing Proceeding/Discharge on Oct. 14, 1993, *United States v. Carlisle*, No. 1:93:CR:66-02, slip op. at 1 (W.D. Mich. Oct. 28, 1993), reprinted in Petition for Writ Certiorari, Appendix A, *Carlisle v. United States*, 517 U.S. 416 (1996) (No. 94-9247) and Joint Appendix at 33-34. The district judge had initially written two decisions, one granting and one denying the motion. In August, the judge issued the decision denying relief but, by the time of sentencing in October, concluded that the motion had to be granted because the defendant was legally innocent. The Sixth Circuit reversed, holding that the motion for acquittal was untimely. See *United States v. Rupert*, 48 F.3d 190 (6th Cir. 1995).

The Government's brief before the Supreme Court noted that by October of 1993, the trial judge had received a presentence report, informing him of a sentencing guideline range of 63 to 78 months, the mandatory minimum of five years, and of the defendant's distinguished military service in Vietnam. Brief for the United States at 7-8, *Carlisle* (No. 94-9247). The defendant's reply brief objected to the implicit claim that the trial judge's ruling was motivated by sympathy and argued that the evidence was legally insufficient to support the conviction. Reply Brief for Petitioner at 2-13, *Carlisle* (No. 94-9247).

100. FED. R. CRIM. P. 29(c) provides that motions for judgment of acquittal "may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period."

101. See *United States v. Carlisle*, No. 1, 93:CR:66-02, slip. op. at 1, n. 1 (W.D. Mich. Oct.

Through an opinion written by Justice Scalia,<sup>102</sup> the Court disagreed, holding that the rule was the sole source of authority to act—preventing a judge from relying on inherent powers to craft other remedies.<sup>103</sup> In dissent, Justice Stevens argued that the rules did not sap trial judges of the “power ‘inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.’”<sup>104</sup>

The use of federal rules as a limitation on judicial equitable power does not quite fit the rationale of courts as agents of Congress. The agency model is premised on a preference for lawmaking coming from the democratic processes embodied in congressional legislation rather than emanating from courts. But Federal Rules (of civil or criminal procedure) do not express the unvarnished will of the legislature because the role played by Congress in procedural rulemaking is less direct than when enacting statutes. In 1934, Congress delegated the power of rulemaking—for rules of “practice and procedure” that cannot abridge “substantive rights”—to the judiciary,<sup>105</sup> which drafts rules through committees. The Chief Justice appoints the members of the

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27, 1993), *reprinted in* Joint Appendix at 37-44, *Carlisle* (No. 94-9247). The trial court concluded that the evidence, viewed in the light most favorable to the government, was “insufficient to prove beyond a reasonable doubt” that Charles Carlisle had “knowingly and voluntarily joined” a conspiracy to possess marijuana with intent to distribute it. *Id.* at 44.

102. Justice Scalia’s opinion for the Court was joined by the Chief Justice, Justice O’Connor, and Justice Thomas. *Carlisle*, 517 U.S. at 417-33. The concurrences by Justice Souter and by Justice Ginsburg (joined by Justices Souter and Breyer) are discussed *infra* note 103.

103. *Carlisle*, 517 U.S. at 421-24. The opinion insisted on the correctness of its own reading of the rule, described as “plain and unambiguous.” *Id.* at 421. The decision did note that earlier precedents had viewed the mandate in another Federal Criminal Rule, Rule 2, as a charter to deviate from other rule-based time limits. That rule states that courts are “to provide for the just determination of every criminal proceeding . . . and to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” *Id.* at 424-29 (quoting FED. R. CRIM. P. 2). Justice Scalia distinguished the other cases as resting on historical practices and argued that, in contrast, setting aside guilty verdicts had no comparable historical pedigree. *Id.*

Justice Souter concurred to note that congressional limitations on the inherent powers of courts could raise Article III issues but that Rule 29’s time limits on a judge’s power, *sua sponte*, to grant a judgment of acquittal were not such an “unconstitutional interference with the court’s inherent authority.” *Id.* at 434 (Souter, J., concurring). Justice Ginsburg’s concurrence, joined by Justice Souter and Justice Breyer, understood Rule 29(c) to impose time prescriptions but noted that alternative remedies—including a motion for post-conviction relief based on ineffective assistance of counsel—remained. *Id.* at 434, 435-36 (Ginsburg, J., concurring). Justice Stevens, joined by Justice Kennedy, dissented. *Id.* at 436-55 (Stevens, J., dissenting).

A more generous approach to rules can be found in *United States v. Cotton*, 122 S. Ct. 1781 (2002). There, the Court concluded that the plain error test of Federal Rule of Criminal Procedure 52(b) did not invalidate a conviction despite a defective grand jury indictment because no real threat to the “fairness, integrity, or public reputation of judicial proceedings” had been posed. *Id.* at 1786.

104. *Carlisle*, 517 U.S. at 437 (Stevens, J., dissenting) (quoting *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 190 (1919)).

105. See Rules Enabling Act, Pub. L. No. 78-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071-2077 (2000)).

drafting committees,<sup>106</sup> whose products are reviewed by other committees, the Judicial Conference itself, and the Supreme Court, which has the option of transmitting to or withholding rules from Congress.<sup>107</sup> While once lawyers played a central role, judges now dominate the drafting process.<sup>108</sup> Their rules become effective, absent congressional override, within a fixed period of time.<sup>109</sup> The silence of the rules is thus the silence of the judges themselves.

Given the odd legal status of rules, Robert Cover argued that their legality hinged on their inability to infringe on judicial remedial authority.<sup>110</sup> In light of what he termed "the problematic character of the Federal Rules under the Constitution,"<sup>111</sup> they could not be read to remove the power of a court to create remedies. "Remedial creativity" had to be exercised apart from and in addition to the Federal Rules for, otherwise, the Rules would violate the statutory mandate not to "abridge, modify, or enlarge" substantive rights.<sup>112</sup>

Moreover, a question exists as to whether the rules were silent. As was argued in *Grupo Mexicano*, the 1938 Rules, providing for a single form of action—known as a "civil action"<sup>113</sup>—represent the merger of law and equity. Those rules were functional in their approach, eschewing earlier encrusted procedural formats. Indeed, some have criticized the Rules as incorporating too much of equity's practices.<sup>114</sup> If the rules were

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106. See 28 U.S.C. §§ 331, 2072-2074 (2000) (providing for the Judicial Conference to authorize committees on rulemaking). The Chief Justice, as chair of the Conference, makes the selection. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* LAW & CONTEMP. PROBS., Spring/Summer 2001, at 197, 248-52 (detailing the composition of specific committees and charting the influence of Chief Justices, and arguing, *id.* at 250, that Chief Justice Rehnquist has "made appointments that surely were designed to result in a narrowing of discovery"). See also Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

107. The Court has recently declined to transmit a proposed rule to Congress. The Advisory Committee on Criminal Rules had drafted a modification of Federal Rule of Criminal Procedure 26(b) on video-taped deposition testimony. Justices O'Connor and Breyer filed a dissent, and Justice Scalia offered a statement supporting the refusal to promulgate the rule and explaining his view of the constitutional questions that the proposed rule raised. See Statement of Justice Breyer and Justice O'Connor on Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 122 S. Ct. R-49 (Apr. 29, 2002), and Statement of Justice Scalia on the Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 122 S. Ct. R.-46 (Apr. 29, 2002).

108. See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 238-39.

109. See 28 U.S.C. § 2074. As the Chief Justice has explained in another context, the Supreme Court has "supervisory authority over the federal courts." The Court may use that authority to "prescribe rules of evidence and procedure" that bind, subject to modification by Congress and to constitutional constraints. See *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (declining to overrule *Miranda* and finding a congressional statutory override, 18 U.S.C. § 3501, unsustainable under it).

110. See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L. J. 718 (1975).

111. *Id.* at 736.

112. *Id.* at 735 (invoking the language of the Rules Enabling Act, 28 U.S.C. § 2072(b)).

113. FED. R. CIV. P. 2.

114. Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982);

to be a source, they could have supported dynamic equitable regimes, especially through the mandate of Rule 1 to construe and administer the rules "to secure the just, speedy, and inexpensive determination of every action."<sup>115</sup> On the other hand, as Professor Stephen Burbank has pointed out,<sup>116</sup> the history surrounding the drafting of federal rules on provisional remedies might have suggested that special constraints attend federal court inventions, particularly in diversity litigation. Oddly, in light of the majority's expressed commitments (in this case) to history and (in so many others)<sup>117</sup> to states' interests, neither that history nor the role of state law occupied the Court in *Grupo Mexicano*.

#### 4. Ignoring State Practices

Because *Grupo Mexicano* was predicated on federal courts' diversity jurisdiction, a question existed as to whether the relief ought to mirror what state courts would have done—either because federal rules so required (as discussed above) or because the statute authorizing federal rulemaking itself requires deference to state law on the question of remedies. Rule 64 of the Federal Rules directs federal courts to use state provisional remedies absent a federal statute.<sup>118</sup> *Erie Railroad Co. v. Tompkins*<sup>119</sup> was decided in 1938, the same year in which the Federal Rules of Civil Procedure came into force. *Erie*, as interpreted through subsequent cases related directly to the Federal Rules of Civil Procedure,<sup>120</sup> requires that diversity litigants not gain substantively different outcomes through invocation of federal jurisdiction.

Therefore, the lower courts might have thought that Rule 64 or the Rules Enabling Act required them to turn to New York law.<sup>121</sup> Because the parties agreed in *Grupo Mexicano* that New York did not permit prejudgment asset freezing, the courts might either have concluded that the injunction was unavailable or have certified the question

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Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Subrin, *supra* note 79 (raising concerns that the rules were too oriented towards equity, giving too much discretion to judges).

115. FED. R. CIV. P. 1.

116. Burbank, *The Bitter with the Sweet*, *supra* note 11, at 1323-33 (describing the impression that, when the rules were drafted, the federal courts were seen to be pro-creditor and discussing the concerns expressed both in case law and in Congress about the effects of permitting the federal judiciary to have the power to order monetary relief).

117. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000).

118. See FED. R. CIV. P. 64 (stating that "all remedies" providing for "seizure of person or property . . . are available under the circumstances and in the manner provided by the law of the state in which the district court is held").

119. 304 U.S. 64 (1938).

120. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996); *Hanna v. Plumer*, 380 U.S. 460 (1965).

121. In the major academic analyses of *Grupo Mexicano*, Professor Stephen Burbank took both majority and dissent to task for not resting the decision on Rule 64, which he argued, represented a substantive preference for conforming remedies in diversity cases to state law. See Burbank, *The Bitter with the Sweet*, *supra* note 11, at 1331-34, 1337 (also arguing that, in light of the implications for global capital investment, Congress was the institution well situated to respond).



to the state court. But the litigants did not raise any *Erie* issues until the Supreme Court. The lower courts had invoked Rule 65 of the Federal Rules of Civil Procedure, governing the issuance of preliminary injunctive relief. At the Supreme Court, rather than remanding, the majority used the occasion to rein in federal remedial authority more generally.<sup>122</sup> (Since the decision, a few lower courts have, in diversity cases, relied on state law remedies in conjunction with Rule 64 to distinguish *Grupo Mexicano* and to grant injunctions.)<sup>123</sup>

The refusal to defer to state law in *Grupo Mexicano* links that decision to rulings on preemption, another body of contemporary lawmaking about the relationship between federal adjudication and state-based remedies. Although much of the majority's discussion in its recent constitutional jurisprudence claims that Congress is specially constrained when affecting arenas governed by state law,<sup>124</sup> the Court has taken a different tack when interpreting federal statutes. Repeatedly, the Court has read federal legislation as implicitly overriding state law provisions.<sup>125</sup> When *Grupo Mexicano* is placed in the context of the willingness to read federal statutes as preclusive of state remedies, the decision can be seen as a part of a broader hostility to remedies, regardless of their source.

### 5. Refusing Transnational Jurisprudential Exchanges

I began by locating *Grupo Mexicano* within the majority's jurisprudence of rights and remedies. As in the opinions refusing to imply causes of action, *Grupo Mexicano* assumes that when faced with a claim of wrongdoing, the proper judicial posture is inaction absent specific congressional direction. But the decision also aligns with other approaches associated with the Rehnquist Court, specifically its disinclination to join in transnational jurisprudential dialogues.

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122. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). The majority did note that the remedy was not "merely a question of procedure," *id.* at 322, and then applied its newly crafted federal rule.

123. See, e.g., *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 500 (4th Cir. 1999) (interpreting Maryland law and Rule 64); *John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462 (S.D.N.Y. 2000) (concluding that, in diversity cases, Rule 65 provides both the authority to issue and the standards for preliminary injunctions but state law determines whether a litigant's cause of action can support an injunction); *Cendant Corp. v. Forbes*, 70 F. Supp. 2d 339, 343-45 (S.D.N.Y. 1999), *aff'd without published opinion*, 205 F.3d 1322 (2d Cir. 2000) (considering that *Grupo Mexicano* did not resolve the *Erie* issue, and concluding that in diversity actions, federal courts must use state remedial possibilities even if they are in excess of federal equitable powers because uniform federal equitable remedies were not required; further that, when the remedy under state law was "inextricably entwined" with the right—as was the case in a suit under New York law against an executive who had lost a job but had not returned allegedly excess reimbursements agreed to be repaid—courts could issue relief).

124. See, e.g., *United States v. Morrison*, 529 U.S. 598, 616-19 (2000).

125. See *infra* note 460. In 2002, a unanimous Court concluded that state common law tort claims were not preempted by either the Federal Boat Safety Act of 1971 or the decision of the Coast Guard not to promulgate regulations requiring propeller guards on motor boats. See *Spietsma v. Mercury Marine*, 123 S. Ct. 518 (2002).

As both the parties and amici discussed in *Grupo Mexicano*,<sup>126</sup> the kind of remedy sought by the creditors was not new to the common law world. Indeed, it goes by the name of a “*Mareva*” injunction, so termed after a 1975 decision of the English Chancery Court granting that relief.<sup>127</sup> Since then, several common law jurisdictions, including Australia, Canada, and New Zealand,<sup>128</sup> have provided that form of relief, recognized as important in light of the ease of transferring assets in a global economy.<sup>129</sup>

In *Grupo Mexicano*, Justice Scalia noted the existence of the *Mareva* injunction but termed its development a “dramatic departure” from prior practice and, therefore, inappropriate—given “our traditionally cautious approach to equitable powers which leaves any substantial expansion of past practice to Congress.”<sup>130</sup> Although England

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126. See Brief for Petitioners at 16, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999) (No. 98-231) (arguing that a 1975 English decision authorizing such an injunction was evidence of the lack of a traditional predicate for the remedy); Brief for Respondents at 34, n.17, *Grupo Mexicano* (No. 98-231) (arguing that English equity recognized the possibility that courts could issue such injunctions earlier than 1975 and that their use has become widespread). See also Brief of Amici Curiae the Securities Industry Association and the Emerging Markets Traders Association in Support of Respondents at 7-12, *Grupo Mexicano* (No. 98-231); Brief of Amicus Curiae the Dominican Republic in Support of Petitioners at 8, 21, n.13, *Grupo Mexicano* (No. 98-231) (arguing that *Mareva* injunctions were limited to rare instances; opposing the relief as intrusive on debtor-creditor regimes outside the United States, and calling for restraint under principles of comity). The other amicus brief, filed for the United States, Brief of United States as Amicus Curiae Supporting Respondents, did not address this issue.

127. See *Mareva Compani Naviera, S.A. v. Int'l Bulk Carriers, S.A.*, 2 Lloyd's Rep. 509 (Eng. C.A. 1975). Under English statutes, courts had the power to issue injunctions in cases when “just or convenient.” See also General Public Act of 1981, ch. 54, § 37. In 1999, English civil procedure provided for such injunctions under the term “freezing injunctions.” See Peter Devonshire, *Mareva Injunctions and Third Parties: Exposing the Subtext*, 62 MOD. L. REV. 539, n.\* (1999).

128. See *Nat'l Austl. Bank Ltd. v. Bond Brewing Holdings Ltd.* (1991) 1 V.R. 386; *United States v. Friedland*, (1999) 93 A.C.W.S. (3d) 552; *Mooney v. Orr*, (1994) 51 A.C.W.S. (3d) 704; *Natural Gas Corp. Holdings Ltd. v. Grand* (1994) 2 N.Z.L.R. See generally Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, art. 13, available at <http://www.hcch.net/e/conventions/draft36e.html> (permitting such injunctions if the issuing court has jurisdiction over the defendant under specified conditions, including property of defendant); *Provisional and Protection Measures in International Litigation: Mareva and Grupo Mexicano (Panel discussion)*, 94 AM. SOC'Y INT'L L. PROC. 60 (2000); Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257 (1992) (offering an argument for when freeze orders are appropriate).

129. See also *Grupo Mexicano*, 527 U.S. at 338-39 (Ginsburg, J., dissenting); Brief of Amici Curiae the Securities Industry Association and the Emerging Markets Traders Association in Support of Respondents at 5-7, *Grupo Mexicano* (No. 98-231) (noting that more than 1,000 companies from fifty-five countries had registered in excess of \$100 billion in securities for public offerings in the United States; and arguing that, were equitable remedies unavailable, higher rates of return on the loan of capital would inefficiently be imposed, especially for emerging markets).

130. *Grupo Mexicano*, 527 U.S. at 327-29.

could revisit its equity practices to enable evolution over time, the United States (which had, under Justice Scalia's approach, relied on England as its model for equity) was obliged to conform to earlier English practices. In the terms of proceduralists, static (rather than dynamic) conformity was required.

What is refused, through this analysis, is judicial participation in a conversation with other jurisdictions about what shape remedies need to take in light of globalization. Instead, in the United States, equitable practices are posited as distinctly insular, dependent either upon retrospective understandings of this country's precedents and of 1789 English practices or upon congressional action. And, by using the occasion to distance itself from remedies developed by common law courts in other parts of the world, *Grupo Mexicano* fits with the unwillingness of some justices to permit jurisprudence from outside the United States to affect this country's laws.<sup>131</sup>

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131. One such example involves the meaning of the Eighth Amendment. When *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) was pending, much attention was focused on whether members of the Court would rely on international law to determine whether execution of the mentally ill violated prohibitions on cruel or unusual punishment. *Atkins* was the second case that raised the question; an earlier case had mooted. See *McCarver v. North Carolina*, No. 00-8727 (2001), *cert. dismissed as improvidently granted*, 533 U.S. 975 (2001).

*McCarver*, and then *Atkins*, attracted international participants. Amici briefs were filed in opposition to the execution by the European Union and by several United States diplomats who argued the negative effects of executing mentally ill on diplomatic relations with other countries. See Brief of Amicus Curiae the European Union in Support of Petitioner, 2001 WL 648609, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727); Brief of Amici Curiae Diplomats, 2001 WL 648607, *McCarver* (No. 00-8727). Those briefs were also before the Court in *Atkins*.

In *Atkins*, Justice Stevens wrote for a majority, holding that the Eighth Amendment did not permit such executions. He provided two premises: that, in light of legislative changes within the United States, society has come to view mentally retarded offenders as less culpable and that an independent evaluation by the Court provided no reason to disagree with that "legislative consensus." *Atkins*, 122 S. Ct. at 2243. The debate about the effects of non-United States law was noted only by way of a footnote to the comment about the "national consensus" within the United States. See *id.* at 2249, n.21 (citing the Brief of Amicus Curiae the European Union in Support of Petitioner in *McCarver v. North Carolina* (No. 00-8727) for the proposition that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

In contrast, the dissent by the Chief Justice, joined by Justices Scalia and Thomas, brought other countries' views to the fore as if the majority's decision had turned on the point. (Perhaps earlier drafts had done so.) The dissent argued that it failed "to see . . . how the views of other countries regarding the punishment of their citizens" provided support to the decision, that "the viewpoints of other countries simply are not relevant," and that "international opinion" is not a "well-established objective indicator[] of contemporary values." *Id.* at 2254, 2256 (Rehnquist, C.J., dissenting). Justice Scalia also wrote a separate dissent, joined by the Chief Justice and Justice Thomas. Justice Scalia objected to the majority's description of a national consensus against this practice. He argued that the majority's comments deserved "the Prize for the Court's Most Feeble Effort to fabricate 'a national consensus'" because of its footnoted references to submissions by religious and professional organizations and by "members of the so-called 'world community'." *Id.* at 2264. Noting "thankfully" that other nations' views were not "always those of our people," Justice Scalia quoted one of his earlier dissents that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be

Just as the United States stands apart from the International Criminal Court,<sup>132</sup> it is kept apart from developing transnational legal norms. By proffering a conception of federal courts as *sui generis* institutions unlike other court systems, the *Grupo Mexicano* majority shored up “American exceptionalism.”<sup>133</sup>

## 6. Broader Equitable Powers for the Public Interest?

Questions remain about what to make of Justice Scalia’s comment that federal equity could be more far-reaching if acting “in furtherance of the public interest,” as contrasted with private interests.<sup>134</sup> Two cases are invoked for this proposition,<sup>135</sup> but the majority gives no explanation of the relationship between that more permissive attitude toward affirmative public interest litigation and its general prohibition on remedies “unknown in traditional equity practice.”<sup>136</sup>

The two prior decisions upon which the *Grupo Mexicano* majority relied do not ground their greater willingness to respond to public interests in old English equity practice.<sup>137</sup> Indeed, in the case Justice Scalia specifically invoked for the idea that

imposed upon Americans through the Constitution.” *Id.* at 2264 (quotation omitted).

132. See Anthony Dworkin, *The United States and the International Criminal Court: A Briefing*, CRIMES OF WAR PROJECT (May 15, 2002) at <http://www.crimesofwar.org/onnews/news-us-icc.html> (describing the formal notice provided to the Secretary-General of the United Nations of the refusal by the United States to become a party to the Rome Treaty).

133. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002).

134. *Grupo Mexicano*, 527 U.S. at 323-26 (quoting *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937)) (citing and distinguishing *United States v. First Nat’l City Bank*, 379 U.S. 378, 383 (1965)). See also *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 496 (4th Cir. 1999) (commenting that “a court of equity has enhanced authority when the public interest is involved,” such as when asked to respond by the government); *id.* at 499 (citing for that view *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935); *Cent. Ky. Natural Gas Co. v. R.R. Comm’n*, 290 U.S. 264, 271 (1933); *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933)).

135. See *Grupo Mexicano*, 527 U.S. at 323-26 (distinguishing *First Nat’l City Bank*, 379 U.S. 378, which in turn had “relied” on *Virginian Ry. Co.*, 300 U.S. at 552).

136. *Id.* at 327. The dissent, objecting to the constriction of authority altogether, did not raise the problem of the inconsistency of the majority’s approach.

137. One case that the *Grupo Mexicano* majority distinguished was *First National City Bank*, 379 U.S. 378, which involved a tax proceeding against a Uruguayan corporation and in which the district court had temporarily enjoined property transfers. As Justice Scalia noted (see *Grupo Mexicano*, 527 U.S. at 323), the government’s request for an equitable lien there had relied on a federal statute permitting the government to obtain injunctions “necessary or appropriate for the enforcement of the internal revenue laws,” as well as on the idea that equity was more flexible when public interests were at stake. *First National* cited *Virginian Railway* for that proposition. See *First Nat’l City Bank*, 379 U.S. at 380.

When upholding the injunction, the *First National* Court mentioned the public interest and cited two other American cases, *United States v. Morgan*, 307 U.S. 183 (1939), and *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). See *First Nat’l City Bank*, 379 U.S. at 383. Neither *Morgan* nor *Hecht*, in turn, explored English equity practice. *Hecht Co.*, 321 U.S. 321; *Morgan*, 307 U.S. 183. Indeed, *Hecht* stated a broad proposition for the reach of equity:

The essence of equity jurisdiction has been the power of the Chancellor to do

public interests license broader equity powers, the issue was the legality of an equitable order under the Railway Labor Act to negotiate with representatives certified by the National Mediation Board. The Railway argued that, since equity lacked the power to make parties agree, judges could not compel them to negotiate.<sup>138</sup> Writing for the Court, Justice Stone concluded that "the extent to which equity will go to give relief where there is no adequate remedy at law is not a matter of fixed rule [but] rests in the sound discretion of the court."<sup>139</sup> Commenting that equity courts "may, and frequently do, go much farther both to give and to withhold relief in furtherance of the public interest," he then cited nine American cases, including one from state court.<sup>140</sup> As my

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equity and to mould each decree to the necessities of a particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

*Hecht*, 321 U.S. at 329-30.

In *First National*, Justices Harlan and Goldberg dissented, objecting to the majority's decision, which, they argued, had too easily permitted encumbrances on "foreign owned and situated property." *First Nat'l City Bank*, 379 U.S. at 385 (Harlan, J., dissenting, joined by Justice Goldberg). Their view was that while the court had the power, it ought not to have exercised it because of the low likelihood that the court could obtain personal jurisdiction over the defendant. *Id.* at 390. Neither the discussion by the majority nor by the dissenters turned on English equity practice, although a footnote in the dissent noted one English case on the question of whether the trial court had some power. *Id.* at 387 n.2 (citing *Penn. v. Lord Baltimore*, reprinted in 27 Eng. Rep. 1132 (ch. 1750)). That case, in turn, related to enforcement of an equitable decree relating to the boundaries of what were then English provinces in North America, and while addressing the rights of the private parties, entered the decree "entirely without prejudice to any prerogative, right, or interest in the crown." See *Penn.*, 27 Eng. Rep. at 1139.

138. *Virginian Ry. Co.*, 300 U.S. at 549-50. Also at issue was the constitutionality of the Railway Labor Act itself, upheld as a proper exercise of congressional powers under the Commerce Clause and one that did not violate due process or the Norris-LaGuardia Act. *Id.* at 553-63.

139. *Id.* at 551 (citing *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557, 565 (1869); *Joy v. City of St. Louis*, 138 U.S. 1, 47 (1891); *Morrison v. Work*, 266 U.S. 481, 490 (1925); *Curran v. Holyoke Water Power Co.*, 116 Mass. 90, 92 (1874)). Of these four, only the 1869 decision (by Justice Field)—on whether an equity court ought to enforce a contract providing for specific execution upon application of a party who complied with its terms—invoked English sources. *Willard*, 75 U.S. (8 Wall.) at 565. The case, for Washingtonians, was about whether to compel the sale of real property adjoining a hotel known as the Willard.

140. *Virginian Ry. Co.*, 300 U.S. at 552-53 (citing *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935); *Cent. Ky. Natural Gas Co. v. R.R. Comm'n*, 290 U.S. 264, 270-73 (1933); *City of Harrisonville v. W.S. Dickey Mfg. Clay Co.*, 289 U.S. 334, 338 (1933); *Beasley v. Tex. & Pac. Ry. Co.*, 191 U.S. 492, 497 (1903); *Joy v. City of St. Louis*, 130 U.S. 1, 45 (1890); *Tex. & Pac. Ry. Co. v. City of Marshall*, 136 U.S. 393, 405-06 (1890); *Conger v. New York, W.S. & B.R. Co.*, 23 N.E. 983 (N.Y. 1890)).

Justice Stone relied on the congressional policy of the RLA and noted that equity ought to respond to it, as it had by ordering injunctions to arbitrate. *Virginian Ry. Co.*, 300 U.S. at 552-53 (citing *Tobey v. Bristol*, 23 F. Cas. 1313 (No. 14,065), 3 Story 800 (C.C.D. Mass. 1845); *Red Cross Line & Atl. Fruit Co.*, 264 U.S. 109, 119, 121 (1924); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 278 (1932)). Again, aside from *Tobey*, none of these cases focus on

footnotes following the threads of these cases indicate, many of these decisions examined the propriety of granting equitable relief without expressing the obligation to mine English sources for permission to do so.<sup>141</sup> In short, federal precedents support a broader reading of equitable powers when public interests are at stake but do not ground that position in English equity.

Perhaps the invocation by the majority in *Grupo Mexicano* of a more flexible equity when public interests are at stake was an oblique response to a concern raised in dissent. The dissent noted that the majority's approach prompted questions about the validity of remedies that have become familiar in the wake of *Brown v. Board of Education*. Included are a set of "diverse injunctions that would have been beyond the contemplation of the 18th-century Chancellor," such as school desegregation and antitrust decrees.<sup>142</sup> Perhaps the majority's acceptance of "public interest" injunctions signalled a willingness to limit its own ruling in some set of cases.

Whether the discussion of public interest equity will protect such remedies remains to be seen. It does not necessarily protect other doctrines, now potentially in the "shadow" of *Grupo Mexicano*. One example is the writ of *coram nobis*, which has been assumed to be part of courts' inherent or common law powers<sup>143</sup> and is occasionally used to address the lawfulness of a conviction.<sup>144</sup> Another is the judicially

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English practice. *Tobey*, 23 F. Cas. at 1320. Rather, they advert to the power of equity and address the wisdom of particular discretionary orders. *Tobey* is the one case using English law. That opinion was by Justice Story, sitting as a circuit justice. The case considered whether an equity court ought to require the County of Bristol to submit to an arbitration, called for by a special resolution of the 1839 Massachusetts legislature. *Id.* at 1318. Justice Story concluded that, given the common law's view that agreements to arbitrate were revocable, equity ought not to intervene. *Id.* at 1321.

141. A parallel exists here between the relevance of English law to remedies in equity and the role of English law in determining when, under the United States Constitution, a civil jury trial must be provided. According to one recent analysis, nineteenth century explications of the availability of jury trials in "suits at common law" did not focus on English common law. See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 185-87 (2000). Moses invoked *Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-59 (1847) for its abhorrence of interpreting constitutional grants "according to any English legislation or judicial rule." *Id.* at 191-92. Moses argued that, while commentators in the early twentieth century claimed English common law practices to be the source of the right to a civil jury under the Seventh Amendment, it was not until the 1930s (when the federal civil rules came into being and applied to all civil cases) that the Supreme Court relied on analogies from English common law practices. *Id.* at 188-98. See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81-91 (1998); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 612-13 (2001) (both addressing whether the Seventh Amendment reference to preservation of the right of jury trials was intended to require state law to be used as the "yardstick").

142. *Grupo Mexicano*, 527 U.S. at 337 n.4.

143. See Pushaw, *supra* note 66, at 743 (describing some of those assumptions and challenging some practices, including calling for repudiation of the "practice of exercising" what he terms "beneficial powers without congressional authorization").

144. See *Carlisle v. United States*, 517 U.S. 416, 428-39 (1996), discussed *supra* notes 99-104. Justice Scalia there questioned the continued availability of that remedy, described as no longer likely to be "necessary or appropriate." See also *United States v. Morgan*, 346 U.S. 502 (1954) (deciding that, although in 1946, when adopting amendments to Federal Rule of Civil

imposed requirement that plaintiffs, receiving a "common benefit" because of the work of co-plaintiffs and their lawyers, pay attorneys' fees to such lawyers.<sup>145</sup> Other doctrines, such as *forum non conveniens*, depend on "inherent powers" of courts.<sup>146</sup> In short, by devising a rule of restraint but refusing to acknowledge that it was doing so, the *Grupo Mexicano* majority neither justified normative choices, met the challenge of explaining how earlier precedents accorded with its holding, nor clarified the reach of its ruling.

### 7. Shadowing Equity

What then is to be made of *Grupo Mexicano*? As Mark Tushnet has counseled,<sup>147</sup> commentators ought to be self-conscious about whether they are reading decisions for more or for less than they are worth. As has been illuminated subsequently by the case law developed in *Grupo Mexicano*'s wake, the majority's decision has sometimes been characterized broadly and, at other times, more narrowly.

Recall the facts of the litigation. The lower courts in *Grupo Mexicano* had no doubt that the creditor would prevail but, absent a freeze order, would be left without a remedy.<sup>148</sup> The provisional injunction had been accompanied by a small bond, further evidencing the trial court's confidence of the plaintiff's likelihood of success and of the equities.<sup>149</sup> On interlocutory review, the judgment of the trial court had been affirmed.<sup>150</sup> By the time the case was decided by the Supreme Court, the predictions had proven accurate, for GMD had lost on the merits.<sup>151</sup> The Supreme Court could

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Procedure 60(b), Congress abolished the common law writ of *coram nobis*, the writ remained available in limited circumstances for criminal cases through courts' exercise of their powers under the All Writs Act, 28 U.S.C. § 1651 (2000)); *United States v. Sawyer*, 239 F.3d 31, 36-38 (1st Cir. 2001) (discussing post-*Carlisle* considerations of the writ).

145. See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (as applied in contemporary cases, generally by calculating a percentage of the fund). See generally John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). Few will have incentives to raise this issue, as it is often linked to settlement of large class actions or multidistrict litigations. On the other hand, those subjected to fee orders for misbehavior may bring challenges to the authority of courts to do so. See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

146. For discussion of the degree to which such powers are subject to congressional oversight, see the exchange between Justice Scalia, Justice Souter, and Justice Stevens in *Carlisle*, 517 U.S. at 426-28, 434, 437-43 (mentioning both the doctrine of *forum non conveniens* and attorneys' fees awards).

147. Tushnet, *supra* note 15 at 48-56 (offering a "modest" interpretation of the Supreme Court's recent decisions and contrasting that with a broader approach).

148. See *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 692 (2d Cir. 1998).

149. The trial court had required the bond of \$50,000, which saved the case from mootness at the Supreme Court. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 308 (1999).

150. *Grupo Mexicano*, 143 F.3d at 698.

151. *Grupo Mexicano*, 527 U.S. at 318.

have made a narrower determination—for example, either that federal courts ought to defer to state courts or that federal courts ought not issue freeze orders under the particular circumstances of an offshore debtor facing bankruptcy.<sup>152</sup>

Given that record, it is not surprising that some lower courts have seen the resultant principle of *Grupo Mexicano* as far-reaching—that federal courts lack general equitable remedies to provide freeze orders to unsecured creditors seeking money judgments.<sup>153</sup> More generally, this ruling could be used to undermine the fusion of law and equity and the authority of common law courts to apply equitable remedies. Illustrative is an Enron-related ruling, stating that “a district court may not grant a preliminary equitable remedy in an action at law [because] equitable devices may not be used by a court exercising jurisdiction at law.”<sup>154</sup> Further, in conjunction with the current law of implied remedies, *Grupo Mexicano* has been taken to mean that, when faced with congressional provision of a particular remedy, no others can be inferred.<sup>155</sup> Moreover, even when express congressional authority has been provided, courts have read *Grupo Mexicano* as “counsel[ing] caution in” expansive reading of such statutory provisions.<sup>156</sup> And a majority of the Supreme Court itself has invoked *Grupo Mexicano* for the prudential proposition that statutes specifying particular powers should be read

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152. One might, for example, see the decision to freeze assets as an unwise use of equitable powers given the third party effects that could flow. In *Grupo Mexicano*, that argument was made, and the district court’s order expressly provided that “nothing contained herein shall prohibit the defendants from commencing any insolvency proceedings under any applicable law.” Order Granting Preliminary Injunction at 27a, *Grupo Mexicano* (No. 98-231).

153. For application of that precept, see *ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426, 430 (2d Cir. 2000); *Travelers Cas. & Sur. Co. of Am. v. Beck Dev. Corp.*, 95 F. Supp. 2d 549, 552 (E.D. Va. 2000) (both concluding that, pending a final decision seeking only monetary relief, injunctions were unavailable to prevent disposition of assets).

154. *In re Enron Corp. Litig.*, No. Civ. A. G-02-0084, H-01-3624, 01-CV-3645, 2002 WL 1001058, at \*3 (S.D.Tex. May 16, 2002) (rejecting requests for a TRO to enjoin Arthur Anderson’s efforts to dissolve or spin off on the basis that the underlying relief was “entirely legal” rather than equitable). That court did find jurisdictional authority for requests made by another group of plaintiffs seeking rescission and restitution but concluded that the requirements for preliminary relief had not been met, in that dissolution per se would not necessarily result in irreparable injury. *Id.*

155. *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 927 (6th Cir. 2000) (concluding that, “despite lack of legislative history and cases on point, . . . when Congress provided for specific legal relief in the 1916 Anti-Dumping Act, it implied that other relief would not be appropriate” and therefore declining to enjoin the importation of hot rolled steel). For the proposition of the exclusivity of remedy, the Sixth Circuit also cited *Transamerican Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). See *Wheeling-Pittsburgh Steel Corp.*, 221 F.3d at 927. Further, the appellate court discussed the complications of such injunctions for trade policy, which might have resulted in an argument about the reasons not to provide an injunction as distinct from a discussion of the lack of power to grant injunctive relief per se. *Id.* at 928.

156. *United States v. Sriram*, 147 F. Supp. 2d 914, 948 (N.D. Ill. 2001) (authorizing the freezing of more than \$1.6 million in a case in which the United States sought funds for false claims made for Medicare payments because that sum was “traceable to the violation” that the government was likely to prove). The court concluded that the False Claims Act could not provide the basis for freezing other assets to enable payment of treble damages and civil penalties. *Id.*



as counseling against permitting "further development" by courts.<sup>157</sup>

Assuming that both equitable and legal relief might be available in a particular case, other questions arise. Ought judges assess whether one kind of relief predominates, thereby developing a jurisprudence to identify when equitable relief is "incidental" or "ancillary" as contrasted with central to a claim?<sup>158</sup> And how are judges to decide whether the "ultimate relief sought" is "equitable in nature"?<sup>159</sup> That inquiry is reminiscent of a newly imposed element of Commerce Clause jurisprudence, requiring lower courts to assess whether a regulated activity is "economic in nature."<sup>160</sup> This approach has prompted lower court judges to consider questions such as the link between endangered wolves and commerce<sup>161</sup> and the nexus that homemade and allegedly pornographic photographs have to markets.<sup>162</sup> As I have elsewhere detailed, nature does not create categories of "the economic," but human judgment—purposeful rather than innate—does.<sup>163</sup>

On the other hand, since *Grupo Mexicano*, freeze orders have been upheld or described as available under a variety of conditions. Lower courts have concluded that

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157. See *Norfolk Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811, 820 (2001). Justice Scalia wrote the opinion for the Court, which held that a negligent breach of a general maritime duty of care was actionable when it caused death. *Id.* Justice Ginsburg, joined by Justices Souter and Breyer, concurred to disassociate themselves from this approach, which they characterized as "dictum." *Id.* at 820, 821. The concurrence described the "development of the law in admiralty as a shared venture" in which "federal common lawmaking" did not stand still, but "harmonize[d] with the enactments of Congress in the field." *Id.* at 821 (quotations omitted).

158. That kind of problem has been faced in the context of Federal Rule of Civil Procedure 23, which requires notice to be provided at the time class actions are certified under 23(b)(3) (often termed damage class actions) but not if certified under 23(b)(1) and (2) (sometimes called injunctive or mandatory classes). See, e.g., *In re Indus. Life Ins. Litig.*, 208 F.R.D. 571 (E.D. La. 2002) (denying class certification under 23(b)(2) of a proposed class of "[a]ll African-Americans who own" or owned life insurance issued at a substandard rate because monetary relief predominated). That court relied on *Great-West*, although "not directly on point," for the requirement that courts search for "whether the real remedy is primarily for injunctive . . . or monetary relief." *Id.* at 573.

159. See, e.g., *Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.*, No. 00 Civ. 8051 (JSM), 2000 WL 1610790, at \*1 (S.D.N.Y. Oct. 27, 2000) (invoking *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)). A thoughtful effort to make such a determination comes from *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 702-04 (S.D. Tex. 2002) (analyzing whether the remedy of "disgorgement" of insider trading proceeds, authorized under Section 20A of the Securities and Exchange Act, permitted equitable relief and determining it did but that, because irreparable harm had not been established through evidence of risk of removal of assets, no temporary restraining order should issue).

160. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (commenting that, "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity . . . , thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"); *United States v. Lopez*, 514 U.S. 549, 560 (1995) (noting that, when intrastate "economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

161. See *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom. Gibbs v. Norton*, 531 U.S. 1145 (2001).

162. See, e.g., *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000).

163. Resnik, *Categorical Federalism*, *supra* note 14, at 639-42.

when litigants seeking monetary damages also have a basis for equitable relief<sup>164</sup>—either by rights to specific assets<sup>165</sup> or through equitable interests in assets<sup>166</sup>—and can establish a sufficient nexus between the assets to be frozen and the relief sought, freeze orders are permitted.<sup>167</sup> Further, all agree that, if specific statutory authority in addition to equitable jurisdiction exists,<sup>168</sup> relief is available, and courts now debate whether particular statutes so authorize.<sup>169</sup> Moreover, as noted, some have applied state law in cases predicated on diversity jurisdiction and issued relief that might otherwise be unavailable.<sup>170</sup>

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164. *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 489, 494-95 (4th Cir. 1999) (upholding a prejudgment injunction freezing assets in a federal False Claims Act suit, upon a showing by the plaintiff United States that health care providers had defrauded Medicare and were reorganizing and transferring assets to insulate themselves from liability).

165. *Id.* at 496 (describing the requirement of a “nexus between the assets sought to be frozen through an interim order and the ultimate relief”); *Nat’l Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1231 (D. Colo. 2000) (granting a preliminary injunction freezing assets when both equitable and monetary relief were sought); *III Finance Ltd. v. Aegis Consumer Funding Group, Inc.*, N. 99 Civ. 2579 (DC), 1999 WL 461808, at \*4 n.1 (S.D.N.Y. July 2, 1999) (distinguishing *Grupo Mexicano* as inapplicable because the plaintiff claimed a “security interest in the assets subject to the preliminary injunction”).

166. *Trafalgar Power, Inc. v. Aetna Life Ins. Co.*, 131 F. Supp. 2d 341, 349 (N.D.N.Y. 2001) (relying on the equitable rights available under state law); *Wishnatzki & Nathel, Inc. v. H.P. Island-Wide, Inc.*, No. 00 Civ. 8051 (JSM), 2000 WL 1610790, at \*2 (S.D.N.Y. Oct. 27, 2000) (granting an injunction to freeze assets on a showing of an equitable interest as beneficiaries of a statutory trust).

167. Courts seek to assess that such claims are not only a matter of “artful pleading.” *See Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 700-01 (S.D. Tex. 2002) (distinguishing between forms of restitution and noting that, in equity, constructive trust and equitable accountings were undertaken). Further, orders restraining, rather than freezing assets, have been upheld. *See Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999) (upholding a preliminary injunction in a shareholder derivative action alleging violations of RICO, fraudulent conveyance, and breaches of fiduciary duties, and distinguishing the general “freeze” order in *Grupo Mexicano* from that issued by the district court, which had provided that defendants could not complete a specified transaction that would have dissolved the company).

168. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 318, 321-22 (1999). *See also In re Dow Corning*, 280 F.3d 648, 657-58 (6th Cir. 2002) (finding that the Bankruptcy Code provided “sufficient statutory authority” for injunctive relief, and therefore that the court was not “confined to traditional equity jurisprudence available at the enactment of the Judiciary Act of 1789”).

169. *Compare Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) (granting injunctive relief), *cert. granted sub nom. Scheidler v. Nat’l Org. for Women, Inc.* 122 S. Ct. 1604 (2002), and *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) (holding that a private plaintiff in a RICO civil action may obtain injunctive relief) with *Religious Tech. Ctr. v. Wollersheim*, 795 F.2d 1076 (9th Cir. 1986) (concluding that injunctive relief was not available). *See also Newby*, 188 F. Supp. 2d at 696 (concluding that authorization for legal remedies in Section 10(b) and Section 20A of the Securities Exchange Act did not preclude requests for equitable relief).

170. *See cases cited supra* note 123.

*B. Limiting the Meaning of the Mandate to Fashion "Appropriate Equitable Relief": Great-West Life & Annuity Insurance Company v. Knudson*

But arguments for reading *Grupo Mexicano* narrowly are undercut by other recent Supreme Court decisions. Illustrative is a 2002 ruling, also authored by Justice Scalia, again addressing the remedial authority of federal judges to respond to creditors, this time proceeding under a provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), which specifically permits the award of "appropriate equitable relief."<sup>171</sup> For those of us intrigued by shifts in the understanding of federal remedial powers, *Great-West Life & Annuity Insurance Co. v. Knudson* is worth exploring.<sup>172</sup> As is detailed below, it builds on the conceptual framework underlying *Grupo Mexicano* and may well signal an interest in exporting its narrow reading of ERISA's grant of equitable powers to many other statutes.

A car accident left a woman, Janette Knudson, quadriplegic.<sup>173</sup> Her husband, an

171. Employee Retirement Income Security Act of 1974 ("ERISA"), § 502(a)(3)(B), 88 Stat. 891, 29 U.S.C. § 1132(a)(3) (2000). The decision on this question, *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), is part of a series of cases, some evidencing a narrow and others a broader reading of ERISA. Those cases include: *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151 (2002); *Harris Trust & Sav. Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316 (1997); *Variety Corp. v. Howe*, 516 U.S. 489 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). See Langbein, *supra* note 11; Medill, *supra* note 11. The issues include how to conceive of the purpose and scope of ERISA and what to make of shifting attitudes toward preemption and the interrelationship among ERISA sections. An early reading of *Great-West* left some practitioners unclear about what effect the decision "will ultimately" have on ERISA jurisprudence. See Robert N. Eccles & David E. Gordon, *Great-West Life—The First 100 Days*, 10 ERISA LITIG. REP. 1 (Apr. 2002).

172. See Meltzer, *Judicial Passivity*, *supra* note 11. Further, unlike some of the other ERISA decisions, the majority that coalesced in *Great-West* is the same as that of *Grupo Mexicano* and in the major constitutional decisions limiting congressional powers. In *Great-West*, 534 U.S. 204 (2002), Justice Scalia wrote for the majority, which also included the Chief Justice, and Justices O'Connor, Kennedy, and Thomas. *Id.* at 710. Justice Souter joined the dissent by Justice Ginsburg, as did Justices Stevens and Breyer. *Id.* at 720 (Ginsburg, J., dissenting). Justice Stevens also filed a separate dissent. *Id.* at 719 (Stevens, J., dissenting). In contrast, in some other ERISA decisions, such as *Mertens*, 508 U.S. 248 (1993), Justice Scalia wrote for a five person majority consisting of Justices Blackmun, Kennedy, Souter, and Thomas. *Mertens*, 508 U.S. at 249. Justice White's dissent was joined by Chief Justice Rehnquist and Justices Stevens and O'Connor. *Id.* at 263 (White, J., dissenting). Justices Ginsburg and Breyer were not then on the Court.

173. By the time the case was before the Supreme Court, Mr. Knudson was described as her "estranged husband." Ms. Knudson was described as a quadriplegic with sole responsibility for raising her nine year old daughter. See Brief in Opposition for Respondent Janette Knudson at 2, 5, 10, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (No. 99-1786) (also arguing her lack of material interest in the dispute). Ms. Knudson's lawyer argued that she had no reason to participate at the Supreme Court level. See Motion to Dismiss as Improvidently Granted at 4-5, *Great-West* (No. 99-1786) (arguing that, while below jurisdiction had been in dispute, the parties no longer disputed the applicability of ERISA, and therefore, no

employee of Earth Systems, Inc., was covered by a health plan that provided some \$400,000 to her for medical expenses. Pursuant to an agreement with the plan, Great-West Life & Annuity Insurance Company paid the vast bulk of those costs. The plan, in turn, had provisions for recoupment if a beneficiary recovered from a third party.<sup>174</sup> When the Knudsons settled a pending state court action with the car manufacturer for \$650,000,<sup>175</sup> Great-West filed a claim against the funds, first in state court and then in federal court.<sup>176</sup>

As noted, the ERISA provision at issue expressly authorizes “appropriate equitable relief.”<sup>177</sup> Thus Great-West sought an injunction against the failure of the Knudsons to

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case or controversy existed). The Supreme Court invited an amicus to argue in support of the Ninth Circuit’s decision. The Amicus stated that, by the time the case was before the Ninth Circuit, Mr. Knudson was no longer participating in the litigation, although the “Right of Recovery Agreement” that he had signed as the employee did run against him. *See* Brief of Amicus Curiae in Support of the Judgment Below by Invitation of the Court at 14-17, *Great-West* (No. 99-1786). In the record, some briefs name both of the Knudsons as litigants.

174. The Plan provided that the employer had:

the right to recover from the covered person any payment for benefits paid for treatment of such loss . . . which the covered person is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, [that] the covered person receives [from third parties or their insurers, and that such liens] will not exceed the amount of benefits paid . . . or the amount received by the covered person . . . from the third party.

Petition for a Writ of Certiorari at 5, *Great-West* (No. 99-1786). Further, after the injury, the employed spouse signed a “Right of Recovery Agreement” on behalf of his spouse. According to Great-West, had Mr. Knudson not signed, the payment for medical treatment would not have been made. *Id.* at 6-7.

175. Of that amount, the lawyer received more than \$370,000 in fees and costs. California Medicaid was paid \$5,000. Great-West received almost \$14,000—leaving about \$250,000 for Ms. Knudson’s care in a “special needs trust” established under California law. *See Great-West*, 534 U.S. at 207-08.

176. Great-West sought unsuccessfully to remove the state tort action. *See* Order Granting Plaintiffs’ Motion to Remand at B-1 to B-4, *Great-West* (No. 99-1786). Thereafter, Great-West filed an independent federal lawsuit. The district court concluded that, because the state court had reviewed the fairness of the settlement and superintended the allocation of payments to various creditors, that court’s award to Knudson of \$13,828 for medical treatment was the amount due to Great-West as reimbursement. *See* Order Granting Defendant’s Motion for Summary Judgment at C-1 to C-12, *Great-West* (No. 99-1786).

In an unpublished decision, the Ninth Circuit affirmed the grant of summary judgment in favor of Knudson, but on different grounds. *See* *Great-West Life & Annuity Ins. Co. v. Knudson*, No. 98-56472, slip op. at 4 (9th Cir. Feb. 7, 2000), *Great-West* (No. 99-1786), Petition for Writ of Certiorari, Appendix at A-1 to A-4. Relying on its earlier ruling (*FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997)), the Ninth Circuit held that “reimbursement of payments made to a beneficiary of an insurance plan by a third party” is not “equitable within the meaning of § 1132(a)(3).” *Great-West Life & Annuity Ins. Co. v. Knudson*, No. 98-56472, slip op. at 4 (footnote omitted).

177. 29 U.S.C. § 1132 (a)(3), also referred to as section 502(a)(3), which provides that a civil action may be brought

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain

reimburse the company and a request for restitution, which, it argued, were both forms of “appropriate equitable relief.”<sup>178</sup> But, in *Great-West Life & Annuity Insurance Co. v. Knudson*,<sup>179</sup> the majority concluded that what Great-West sought was a remedy at law, not available under the relevant ERISA provisions.

### 1. Editing Statutes

In the ERISA provision interpreted in *Great-West*, Congress had mandated “appropriate equitable relief” but had neither defined nor refined that category. In an earlier opinion (also written by Justice Scalia)—*Mertens v. Hewitt Associates*—the Court had required that claimants under this provision establish not only that the form of equitable relief they sought was “equitable” but also that it was “typically available in equity.”<sup>180</sup> The majority concluded that Great-West’s request for an injunction for specific performance of a contract to pay damages failed that test.<sup>181</sup>

Although Justice Scalia’s majority opinion acknowledged that restitution was an equitable remedy, the majority sorted the forms of restitution—deeming some historically available at law and others in equity.<sup>182</sup> According to Justice Scalia, only when a plaintiff could show that money or property in a defendant’s possession could “clearly be traced” back to the plaintiff was the restitution grounded in equity; then, equity responded “ordinarily [by providing relief] in the form of a constructive trust or an equitable lien.”<sup>183</sup> Further, the majority did not narrow its ruling in response to an amicus brief filed by the United States, arguing that because the Secretary of Labor was authorized to bring civil actions to redress ERISA violations,<sup>184</sup> the case did not

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other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan.

178. Petitioner’s Brief Seeking Injunction at 12-32, *Great-West* (No. 99-1786).

179. 534 U.S. 204 (2002).

180. *Id.* at 210 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993), which held that the reference in 29 U.S.C. § 1132(a)(3) to “equitable relief” entailed the forms of relief “typically available” in equity). Not all commentators agree with that reading. See Langbein, *supra* note 11 (disagreeing about this interpretation of ERISA). Justice Scalia wrote the majority decision in *Mertens*, joined by Justices Blackmun, Kennedy, Souter, and Thomas. *Mertens*, 508 U.S. at 249. Justice White, joined by the Chief Justice, Justice Stevens, and Justice O’Connor dissented. *Id.* at 263 (White, J., dissenting). Justice White noted that the majority agreed that the phrase “appropriate equitable relief” could be interpreted to include remedies available in equity for breach of trust and that compensatory monetary awards were available for such breaches. *Id.* at 273-74 (White, J., dissenting). Justice White argued that the majority had wrongly assumed that Congress had “stripped” trust beneficiaries under ERISA from remedies other beneficiaries enjoyed “in the equity courts under common law,” *id.* at 263 (White, J., dissenting), and that the majority’s construction worked to “deprive beneficiaries of remedies they enjoyed prior to the statute’s enactment.” *Id.* at 274 (White, J., dissenting).

181. *Great-West*, 534 U.S. at 210-11.

182. *Id.* at 214-15. But see Langbein, *supra* note 11, at 30 (disagreeing with that view of historic equity practice and explaining that “money damages were and are as much an equitable remedy as a legal remedy”).

183. *Great-West*, 534 U.S. at 213. Justice Scalia also noted a “limited exception for an accounting for profits.” *Id.* at 214 n.2.

184. See 29 U.S.C. § 1132(a)(5) (2000).

involve only “the scope of private civil actions.”<sup>185</sup> Although commentary in *Grupo Mexicano* had suggested the possibility of special rules for actions involving public interests,<sup>186</sup> no mention was made in *Great-West* of using a different approach for cases brought by the Secretary of Labor.

Rather, the majority imposed historical and factual burdens on plaintiffs. Take the requirement that the relief sought be “typically available” in equity. What quantum of proof suffices to establish the typicality criterion? The United States had argued in *Great-West* that when the *Mertens* Court introduced the concept of typicality, it had offered a laundry list of illustrative forms of relief—“injunction, mandamus, and restitution”—all distinguished from compensatory damages.<sup>187</sup> Thus, the government claimed, because the Court had defined typicality as related to the form rather than to the frequency of a particular order, and because preventing unjust enrichment was a form of relief typical in equity,<sup>188</sup> *Great-West* should prevail. The majority’s rejection of that approach leaves plaintiffs’ lawyers with difficult research challenges and lower court judges with choices about what number of references, in original or secondary references, suffices to meet the typicality requirement. Moreover, the combination of *Grupo Mexicano* and *Great-West* counsels against assuming judicial capacity to remediate.

These decisions also warn against inferring authority from statutory texts. The *Great-West* majority reasoned that when Congress added the adjective “appropriate” to its grant to provide “equitable relief,”<sup>189</sup> Congress must—at the same time—have intended to remove some forms of remedial power. According to Justice Scalia, the phrase chosen by Congress had to be read to mean “something less than all relief” that “a court of equity is empowered to provide.”<sup>190</sup> And like his rhetorical choices in

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185. Brief for the United States as Amicus Curiae Supporting Petitioners at 2, *Great-West* (No. 99-1786).

186. Above, I argued that, while such a reading fits the precedents, it was an ahistorical addition, at odds with the opinion’s test. See discussion *supra* Part II.A.6.

187. *Mertens*, 508 U.S. at 256. As John Langbein explains, this formulation misdescribed English historical practices, under which mandamus was a common law bench writ, not an equity writ. See Langbein, *supra* note 11. Moreover, some argued that the *Mertens* formulation had been relegated to a footnote because, as evidenced by subsequent Supreme Court ERISA decisions as well as lower court rulings, its strictures were sometimes avoided. See Brief Amicus Curie of AARP and National Employment Lawyers Association in Support of Neither Party at 2, *Great-West* (No. 99-1786) (arguing that the Court’s holding in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000), which permitted the recession of a transaction, restitution, and disgorgement as proper common law remedies for trusts has limited *Mertens* and, further, that some circuits had recharacterized relief as money damages to meet the *Mertens* requirements). See also Medill, *supra* note 11.

188. Brief for the United States as Amicus Curiae Supporting Petitioners at 12-14, 19-26, *Great-West* (No. 99-1786).

189. Under the holding of *Grupo Mexicano*, such statutory grants are required to license federal judicial remedial powers. See *Grupo Mexicano de Desarrollo, S.A. v. Alliance Board Fund, Inc.*, 527 U.S. 308, 325-26 (1999).

190. *Great-West*, 534 U.S. at 211-12 (relying on *Mertens*, 508 U.S. at 258 n.8). *Great-West* also built on an earlier dissent by Justice Scalia in *Bowen v. Massachusetts*, 487 U.S. 879, 917-19 (1988), in which he had objected to the majority’s interpretation of the Administrative Procedure Act (“APA”) to permit courts to reimburse states and therefore order the payment of

*Grupo Mexicano*, Justice Scalia insisted on the correctness of his approach: "what Congress has plainly done" was to limit the available relief, and any other construction was "most implausible."<sup>191</sup> Moreover, Justice Scalia was confident that "Congress felt comfortable referring to equitable relief in this statute . . . precisely because the basic contours of the term are well known."<sup>192</sup>

In contrast, Justice Ginsburg (dissenting on behalf of herself and Justices Stevens, Souter, and Breyer) questioned the majority's assumption that members of the 1974 Congress would have been attuned to the nuances of early equity practices and would have enshrined them in ERISA.<sup>193</sup> Rather, she argued, the majority thwarted the goals of Congress, which had worked in the 1970s, some forty years after the merger of law and equity, to craft a "uniform administrative scheme" enforceable in federal courts for employment welfare plans and their beneficiaries.<sup>194</sup> Further, the dissent argued that restitution to avoid unjust enrichment was in fact a remedy typical of equity.<sup>195</sup>

The majority positioned itself as the faithful agent, dutifully fulfilling its principal's mandate. But the language at issue cannot become plain simply by the assertion that it is. The text "appropriate equitable relief" does not include the word "typical." Further, the text does not detail the range of discretion accorded judges in determining what qualified for the description "appropriate." Interpretative choices abound.<sup>196</sup> Why then have an image of a retentive Congress rather than a generous one? Why assume that ERISA was not a charter to develop new remedies to respond to changing economic concerns?<sup>197</sup> Just as it has in recent rulings on congressional powers under the Eleventh

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money as part of specific relief to an entitlement provided under federal Medicaid law. The APA authorized judicial review against the federal government for actions "seeking relief other than money damages." See 5 U.S.C. § 705. Justice Stevens, writing for the Court in *Bowen*, had concluded that "the fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages." *Bowen*, 487 U.S. at 893.

191. *Great-West*, 534 U.S. at 217-218.

192. *Id.* at 217. In one respect, *Great-West* departs from the mold of some of the earlier decisions by acknowledging that prior cases did not necessarily make the same distinctions. "Admittedly, our cases have not previously drawn this fine distinction between restitution at law and restitution in equity, but neither have they involved an issue to which the distinction was relevant." *Id.* at 214.

193. *Id.* at 224-228.

194. *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

195. *Id.* at 228. See also Langbein, *supra* note 11, at 64-65 (discussing equity's provision of damages, called "surcharges").

196. Indeed, as Justice Stevens wrote in dissent, more statutory language was relevant than the portion that had commanded the interest of the majority. *Great-West*, 534 U.S. at 222-23. A subdivision of the statute authorizing judges to issue "any appropriate order that prohibits or terminates a violation of an ERISA plan" also used the word "enjoin." *Id.* at 222 (interpreting 29 U.S.C. § 502(a)(3)(A)). *Mertens* addressed aspects of this argument as well. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-62 (1993) (majority decision) and *id.* at 263, 265-69 (White, J., dissenting, joined by Chief Justice Rehnquist, and Justices Stevens and O'Connor). As Justice Stevens explained in his dissent in *Great-West*, in the provision on "appropriate equitable relief," Congress has used the word "other"—"other appropriate equitable relief." *Great-West*, 534 U.S. at 222-23. Justice Stevens thus read Congress as giving federal judges leeway beyond that historically provided by equity. *Id.*

197. Justice Scalia has argued that constitutional interpretation should take as its predicate

and the Fourteenth Amendment,<sup>198</sup> the majority in *Great-West* placed demands on Congress to use words that earlier Congresses had no reason to know were required.

## 2. Ignoring State Proceedings

To understand the potential breadth of *Great-West*, two other aspects of the case, both relevant to federalism, are noteworthy. First, the Court did not address the argument raised by litigants that, while the relief requested by Great-West might have been characterized as “equitable,” it was not “appropriate” because it would spawn duplicative and unnecessary litigation.<sup>199</sup> The Court could have crafted a narrow rule that, if a state court has superintended a settlement and made allocations of funds, a federal court ought to avoid piecemeal litigation by refusing to revisit such decisions through ERISA claims. Such a holding could have been premised in part on equity (that Great-West had sat on its rights by not becoming active in the underlying state tort litigation at an early stage) and in part on abstention doctrines (themselves predicated on a mixture of equity and federalism).<sup>200</sup> That holding would have required ERISA plans to intervene in state court proceedings, which in turn would require the

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that the document is “dead.” See Scalia, *Common-Law Courts*, *supra* note 63, at 112-120 (disagreeing with proponents of a “Living Constitution”). See also Maureen Squires, *Scalia Urges Inflexible Constitution: Supreme Court Justice Scaffs at Notion of a Changing Constitution*, PEORIA J. STAR, Oct. 25, 1996, at C11, available at 1996 WL 6982219; David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377 (1999). Statutes, however, are creatures of a Congress, itself an institution that is alive and able to alter their meaning. The capacity to revise statutes supports interpretative leeway for courts for some judges and commentators, while others point to that very capacity as justification for awaiting revisions by Congress. Of course, by choosing a particular interpretative stance, the Court imposes its reading absent legislative revision. See Tushnet, *supra* note 15.

198. See e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-74 (2001) (rejecting the sufficiency of evidence received by Congress on state-based discrimination against the disabled); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (applying the “clear statement” rule in sovereign immunity cases and thereby requiring Congress to use specific language if seeking to subject states to suit). See generally Evan H. Caminker, “Appropriate” Means-End Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001). Some argue that imposition of clear statement rules enhances democratic processes by clarifying the stakes of a pending legislative proposal. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Manning, *supra* note 17, at 99-102, 121-126. But when such rules are crafted long after legislation is enacted, that rationale is difficult to sustain.

199. See Brief of Amicus Curiae in Support of the Judgment Below by Invitation of the Court at 43-44, *Great-West* (No. 99-1786) (stating that “[i]t makes little sense to permit the ERISA plan, after litigating the case in state court to generate a recovery, to file a separate federal-court suit to litigate the distribution of the same money.”).

200. See, e.g., *Younger v. Harris*, 401 U.S. 37, 53 (1971) (requiring deference to state criminal proceedings in the face of a challenge that they violated First Amendment rights); *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (requiring deference to state courts in their interpretation of an unclear law if such deference could avoid a federal court's determination of a sensitive constitutional question).



assumption that such claims were not preempted by ERISA.<sup>201</sup>

Such an approach would have accomplished one of the goals expressed by the Judicial Conference on behalf of the federal judiciary: reducing a form of ERISA litigation.<sup>202</sup> The majority's holding did so as well, but also by foreclosing other remedies and by signalling general contractions of federal remedial powers. Further, such a holding would have been solicitous of another federalism-based concern, that the federal courts ought to respect state laws on collateral sources of recovery in tort litigation.<sup>203</sup> As one group of amici argued, some states did not permit subrogation of tort awards by health insurers.<sup>204</sup> Had the majority deferred to state court adjudication, it could have linked its decision to federal common law doctrines that, absent an overriding need for uniformity, incorporate state law by reference.<sup>205</sup> Thus, the Court could have permitted state remedies to influence the exercise of federal equitable relief rather than to preclude a remedy for the plaintiff and others similarly situated. I should note that such a response would not be wise from the perspective of those who believe ERISA located jurisdiction to enforce plan terms exclusively in federal courts to avoid disuniformity.<sup>206</sup>

### 3. Revising ERISA Jurisdiction

What may be the import of *Great-West*? Some of the problems it poses directly to ERISA programs were argued in the case. As various amici warned the Court, some programs may reduce their benefits if they are unable to enforce subrogation

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201. Brief of Amicus Curiae by Invitation of the Court in Support of the Judgment Below at 46-49, *Great-West* (No. 99-1786) (noting that the United States side-stepped the preemption problem and arguing affirmatively that preemption was not required in light of decisions such as *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997), *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988)).

202. See LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 95 (1995) (Recommendation 12(b), discussed *infra* notes 258-259 and accompanying text.

203. Some of the Court's ERISA rulings lend support to such an approach. See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc., 519 U.S. 316, 325 (1997); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661-62 (1995).

204. See Brief of Amici Curiae Maryland Subrogation Plaintiffs at 2-10, *Great-West* (No. 99-1786) (citing *Riemer v. Columbia Med. Plan*, 747 A.2d 677 (2000) and 29 U.S.C. § 1144(b)(2)(4) (2000) for the view that ERISA preemption rules permitted incorporation of state collateral source rules).

205. See generally DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS (2001).

206. The Court itself, in the 2002 Term, expressed ambivalence on the question of the need for uniformity. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), state court enforcement of reimbursement provisions was not permitted. *Great-West*, 534 U.S. at 220-21. But in *Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2169-70 (2002), the Court, in a majority decision by Justice Souter writing for himself and Justices Stevens, O'Connor, Ginsburg, and Breyer, concluded that federal law did not preempt state insurance regulations authorizing state boards to review denials of requests for treatments.

agreements.<sup>207</sup> Others may increase their copayments and deductibles,<sup>208</sup> and still others lose their financial integrity.<sup>209</sup> Given the ruling, questions emerge for ERISA plan writers about whether they can amend plans to identify assets of beneficiaries to form constructive trusts subject to equitable restitution,<sup>210</sup> refuse to make payments pending liability determinations, or devise alternative methods of enforcing subrogation and reimbursement provisions through contracts to arbitrate.

In terms of case law application, the first wave of *Great-West* decisions have come in ERISA litigation.<sup>211</sup> As they reveal, *Great-West* is not only a case about remedies but also about federal jurisdiction. Under ERISA, federal courts have exclusive jurisdiction over actions by a fiduciary intending "to enforce . . . the terms of the plan."<sup>212</sup> As *Great-West*'s certiorari petition noted, when interpreting the provision at issue, circuits had split on whether it affected remedies or subject matter jurisdiction.<sup>213</sup> The Ninth Circuit concluded that its order of dismissal could be characterized either as a dismissal on the merits or one based on a lack of subject matter jurisdiction.<sup>214</sup> Thus, when ruling on the availability of a form of relief, the Court implicitly decided the question of jurisdiction.

Unsurprisingly, after *Great-West*, a series of lower courts have dismissed lawsuits.<sup>215</sup> Many efforts to avoid its strictures—through stipulations or by pleading—have been unavailing. As one court put it, plaintiffs could not prevail "on the question of jurisdiction simply by characterizing the action as one for restitution."<sup>216</sup> Further,

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207. Brief of the Central States, Southeast and Southwest Areas Health and Welfare Fund as an Amicus Curiae in Support of Petitioners at 2, 7-9, *Great-West* (No. 99-1786). See also Brief as Amici Curiae in Support of Petitions by the American Association of Health Plans at 6-7, *Great-West* (No. 99-1786) (arguing that, if *Great-West* did not prevail, the result would be greater health care costs and less insurance).

208. See Brief Amicus Curiae of Self-Insurance Institute of America, Inc. in Support of the Petitioner at 10, *Great-West* (No. 99-1786).

209. See Amicus Curiae Brief of National Association of Subrogation Professionals, Inc. in Support of Petitioners at 8-10, 12, *Great-West* (No. 99-1786).

210. See, e.g., *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376, 1380-81 (M.D. Ga. 2002) (distinguishing the *Great-West* ruling on the grounds that the funds in issue—paid to the tort victim but allegedly subject to subrogation—had been placed in a separate account and were clearly traceable from the settlement).

211. See *Eccles & Gordon*, *supra* note 171.

212. 29 U.S.C. § 502(a)(3)(e), codified at 29 U.S.C. § 1132(a)(3)(2000).

213. Petition for Certiorari at 10, *Great-West* (No. 99-1786).

214. See Appendix to Petition for Certiorari at A-4, n. 5, *Great-West* (No. 99-1786), available at 2000 WL 145374, \*\*1, n.5 (9th Cir. Feb. 7, 2000) (discussing the earlier ruling of the court, on which the panel relied, as having rested "its dismissal on the lack of subject matter jurisdiction . . . For our purposes, . . . requiring the dismissal of reimbursement claims for third party settlements under ERISA, the dismissal could be based either on lack of subject matter jurisdiction or on the merits.").

215. See, e.g., *Unicare Life & Health Ins. Co. v. Saiter*, No. 00-3856, 2002 WL 1301574 (6th Cir. June 10, 2002) (per curiam); *Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Truong*, No. CIV. 01-873, 2002 WL 171725 (D. Minn. Jan. 31, 2002) (mem.); *Rego v. Westvaco Corp.*, No. 1:99CV00702, 2002 WL 1009599 (M.D.N.C. Feb. 26, 2002).

216. *Sheet Metal Local #24 Anderson, Tr. v. Newman*, No. 01-3085, 2002 WL 1033739, at \*2 (6th Cir. May 21, 2002) (per curiam) (unpublished opinion) (concluding that a failure to allege that specific funds were wrongly held rendered the case a breach of contract suit for

under the shadow of *Great-West*, one circuit rejected a request for declaratory judgment to enforce terms of employee benefit reimbursement provisions,<sup>217</sup> even when the funds at issue were arguably specific, identifiable, “in custodia legis.”<sup>218</sup> Another applied *Great-West*, which had not involved the breach of fiduciary duties, to preclude a fiduciary from having to pay a beneficiary life insurance because such a remedy was not “typical” in equity.<sup>219</sup> And, to the extent that litigants seek provisional remedies to segregate funds or keep them from being dissipated, *Great-West* does not permit that option.<sup>220</sup>

On the other hand, not all lower courts have read *Great-West* so broadly. A variety of claims have gone forward, resting on theories that a case presented “an equitable claim for unjust enrichment rather than a legal claim for interest as compensatory,”<sup>221</sup> that a constructive trust existed over which the court had jurisdiction,<sup>222</sup> or that fiduciary duties were allegedly breached.<sup>223</sup>

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money damages, over which the federal courts lacked jurisdiction).

217. *Bauhaus USA Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002). *But see* *Provident Life & Accident Ins. Co. v. Cohen*, 193 F. Supp. 2d 845, 852 (D. Md. 2002) (permitting an unjust enrichment claim to proceed for an insurer seeking a declaration that a disability was null and void due to a participant’s false representations); *IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt*, 211 F. Supp. 812 (N.D. Tex. 2002) (distinguishing *Bauhaus* and denying a motion to dismiss because plaintiffs sought a constructive trust over specific funds within the defendant’s possession).

218. *Bauhaus*, 292 F.3d at 445, 451 (Wiener, J., dissenting) (also arguing that, unlike *Great-West*, the request was for subrogation, not restitution or reimbursement). *See also* *IBEW-NECA Southwestern Health & Benefit Fund*, 211 F. Supp.2d at 816 (denying a motion to dismiss by finding funds “clearly traceable” for the pursuit of a constructive trust).

219. *Kishter v. Principal Life Ins. Co.*, 186 F. Supp. 2d 438, 444-45 (S.D.N.Y. 2002). *Great-West* was also invoked in passing when a court held that a state lacked standing to bring suit under ERISA provisions. *See Connecticut v. Physicians Health Servs., Inc.*, 287 F.3d 110, 120 (2d Cir. 2002) (concluding that the criteria for Article III standing had not been met and citing *Great-West* for the view that courts ought not to read ERISA to provide more by way of relief than what was expressly stated).

220. *See DeFelice v. Daspin*, No. CIV.A. 01-1760, 2002 WL 1373759, at \*6-7 (E.D. Pa. June 25, 2002) (dismissing an ERISA action for failure to state a claim in part because the only remedies lay at law).

221. *Dobson v. Hartford Fin. Servs.*, 196 F. Supp. 2d 152, 170-173 (D. Conn. 2002) (also relying on the alleged breach of fiduciary duties and the lack of an adequate remedy at law); *see also* *Bauer v. Gylten*, Nos. A2-00-161, A3-02-27, 2002 WL 664034, at \*2-3 (D.N.D. Apr. 22, 2002) (holding that a plaintiff’s amendment of its complaint to seek a constructive trust substantiated the court’s jurisdiction and reiterating its ruling that under the plan, plaintiff was entitled to relief).

222. *Admin. Comm. of Wal-Mart Stores, Inc. Assoc. Health v. Varco*, No. 0168277, 2002 WL 47159, at \*2-3 (N.D. Ill. Jan. 14, 2002). Cases are also beginning to address what degree of specificity on segregated funds and what chains of custody can sustain orders for equitable accounting and restitutions.

223. *See, e.g., Zack v. Hartford Life & Accident Ins. Co.*, No. 01C8277, 2002 WL 538851, at \*5-6 (D. Kan. Mar. 20, 2002); *see also* *Carducci v. Aetna U.S. Healthcare*, 204 F. Supp. 2d 796, 802 (D.N.J. 2002) (reading *Great-West* to be limited to claims brought by a fiduciary seeking contractual reimbursement and not applying to relief sought by a participant or beneficiary under § 502(a)(1), for which legal or equitable relief is available). *But see* *Kishter v. Principal*

#### 4. Seventy-Seven Statutes Providing for Equitable Relief

*Great-West* may prove to be a case about more than ERISA. As Justice Scalia's decision noted, a "Westlaw search" found "the term 'equitable relief' appeared in seventy-seven provisions of the United States Code."<sup>224</sup> What ought judges to make of the reference to these other statutes, also using the term "equitable"? If, as Justice Scalia argued, Congress was purposeful in its selection of the term "equitable relief" in ERISA,<sup>225</sup> should judges assume that Congress knew of these other statutory references and read them as an interrelated set? For example, as the *Great-West* majority and dissent debated through the example of Title VII,<sup>226</sup> Congress has directed the payment of money as a part of an equitable award. Justice Ginsburg's dissent argued that the Court's prior interpretations of Title VII to permit a type of restitution as a form of equitable relief made appropriate a parallel interpretation for the ERISA statute.<sup>227</sup> Justice Scalia disagreed, dismissing the dissent's argument about Title VII as having "nothing to do with this case."<sup>228</sup> Yet it was that majority that also mentioned the many other statutes that use the term "equitable."<sup>229</sup>

The majority's approach directs federal judges to parse each term in a statutory phrase to understand the remedies chartered.<sup>230</sup> A review of some of the textual variations forecasts the interpretative problems to come. Consider congressional provisions, such as the specification of the remedy of an injunction and authorization of "any other appropriate equitable relief."<sup>231</sup> Ought the words "any other" suffice to license "all" forms of equitable relief? Do courts have a broader mandate when Congress authorizes courts to provide "such legal or equitable relief as will effectuate

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Life Ins. Co., 186 F. Supp. 2d 438, 444-45 (S.D.N.Y. 2002) (concluding that ERISA preempted state claims and that in the case, involving an alleged breach by a fiduciary, the remedy sought—forced payment of life insurance proceeds—was not one "typically available in equity").

224. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 n.3 (2002).

225. *Id.* at 216.

226. 42 U.S.C. § 2000e-5(g)(1) (2000) (providing for "appropriate . . . equitable relief" including "reinstatement or hiring of employees, with or without back pay").

227. *See Great-West*, 534 U.S. at 244, 230 n.2 (Ginsburg, J., dissenting, joined by Justices Stevens, Breyer, and Souter) (and also noting that lower courts had provided various characterizations of why back pay was an equitable remedy).

228. *Id.* at 218 n.4.

229. *Id.* at 217 n. 3.

230. On the Court's calendar for the 2002-03 term is the reach of the RICO statute. *See Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 609-70 (7th Cir. 2001), *cert. granted* *Scheidler v. Nat'l Org. for Women, Inc.*, 122 S. Ct. 1604 (2002). The Seventh Circuit held that, given the text of RICO and its mandate to construe RICO remedies liberally, injunctive relief was available in a private civil action seeking treble damages. A question before the Court is whether "private litigants may obtain equitable relief in a civil RICO action under 18 U.S.C. § 1964. *See* Brief of the United States as Amicus Curiae, *Scheidler v. Nat'l Org. for Women, Inc.*, No. 01-1118, 01-1119, available at <http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.html>.

231. *See, e.g.*, 5 U.S.C. § 8477(e)(3)(A)(iv), B(ii) in the Federal Employees' Retirement System (providing that the Secretary of Labor and plan participants, beneficiaries, and fiduciaries may bring civil actions against fiduciaries).

the purposes” of a particular statute?<sup>232</sup> And what is to be made of directives with other modifications, such as to provide equitable relief “as may be necessary”?<sup>233</sup> Had Congress constrained or simply described the conditions for equitable remedies?

Further, what about directives, such as a provision of federal securities law<sup>234</sup> authorizing relief “in addition to any and all other rights and remedies that may exist at law or in equity”?<sup>235</sup> Has Congress through those words granted power to shape new rights or is its reference to rights and remedies that “may exist” a requirement that courts provide only those rights and remedies as existed in 1789? And more generally, when statutes such as securities laws impose fiduciary obligations, do they endow federal judges with authority to craft equitable remedies?

Yet another question is the effect of this body of law on bankruptcy judges. These judges, serving for term and renewable appointments rather than with life-tenure, have lower status than Article III judges.<sup>236</sup> But, in light of *Grupo Mexicano*, bankruptcy judges may have more power to freeze assets than do life-tenured judges.<sup>237</sup> Yet even bankruptcy judges may find themselves restrained in their ability to order substantive consolidation or to devise other remedies not detailed in the bankruptcy code.<sup>238</sup>

Federal judges may also find constraints in efforts to cope with the demands of large-scale litigation, whether involving structural reform of institutions or aggregate tort and consumer cases. For example, relying on equitable or inherent powers, judges sometimes order litigants to contribute money for disbursements during the pendency

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232. See, e.g., 29 U.S.C. § 633(c) (2000) (authorizing remedies for age discrimination in employment); see also 15 U.S.C. § 3414(b)(4) (2000) (providing for civil enforcement actions related to National Gas regulation and authorizing courts to order injunctions or “such other legal or equitable relief as the court determines appropriate, including refund or restitution”).

233. See, e.g., 12 U.S.C. § 1817(j)(15)(B)(ii) (2000) (relating to penalties for violations of Federal Trade Commission provisions); see also 46 U.S.C. § 1705(i)(3) (2000) (authorizing the grant of “such other equitable relief as the court in its discretion determines necessary or appropriate”).

234. 15 U.S.C. § 78(bb)(a) (2000).

235. This example comes from the analysis provided by Judge Rosenthal in *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 699 (S.D. Tex. 2002) (analyzing whether a claim of insider trading should be read as a breach of fiduciary duty to persons owning stock, any profits from which ought to be understood as held in a constructive trust).

236. See 28 U.S.C. § 151 (2000) (providing for Courts of Appeals to select and appoint bankruptcy judges). See Judith Resnik, *Uncle Sam Modernizes His Justice: Inventing the District Courts for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 629-43 (2002) [hereinafter Resnik, *Inventing the District Courts*] (detailing the distinctions and overlap between sets of judges working within Article III courts).

237. Debtors in bankruptcy may not transfer assets without court approval and, if they do so, those transfers are either void or voidable. Thus, while district judges cannot freeze assets pending monetary relief, bankruptcy judges can. The bankruptcy statute has been understood as a specific authorization to do so. See *In re Dow Corning*, 280 F.3d 648, 657-58 (6th Cir. 2002).

238. See, e.g., J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 AM. BANKR. INST. L. REV. 427 (2000) (discussing whether substantive consolidation, not specifically authorized in the code but used to merge separate entities to aggregate assets and liabilities, remains permissible). See also Steve H. Nickles & David G. Epstein, *Bankruptcy Symposium: Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7 (2000) (raising questions about bankruptcy judges’ common law authority beyond the Code).

of such cases, to fund document repositories, and to support common benefit lawyers.<sup>239</sup> *Great-West*, coupled with *Grupo Mexicano*, established presumptions of judicial incapacity that raise questions about the legality of such innovations. Moreover, *Great-West* may forecast narrow readings of statutes such as the Alien Tort Act, currently a significant font of international human rights litigation in the lower federal courts.<sup>240</sup>

### 5. Characterizing Declaratory Relief

A specific question arises about federal power under the Federal Declaratory Judgment Act of 1934.<sup>241</sup> The antecedents of that statute include English legislation—circa 1852—recognizing the power of the Courts of Chancery to entertain cases in which the remedy would be a declaratory decree or order.<sup>242</sup> In 1917, Professor Edson Sunderland, a major proponent, argued that developing declaratory relief marked a civilization substituting words for physical force.<sup>243</sup> He urged the United States to adopt such provisions rather than continue to “canonize[] the ancient tradition of a cause of action, in all its original crudeness [as] . . . the condition and measure of judicial action.”<sup>244</sup> The need for legislation was predicated on the inadequacy of extant legal and equitable remedies, seen as insufficient in light of changing social conditions.

Congress responded in 1934 that federal courts had the power, consistent with case and controversy requirements, to enter declaratory relief in cases otherwise properly before them.<sup>245</sup> While Congress has expressly given authority for the remedy, that

239. *In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 994 F.2d 956, 966-67 (1st Cir. 1993) (upholding a district court order requiring defendants, who had been dismissed as defendants from the lawsuit, to pay thousands of dollars for the costs of maintaining a document depository); Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 434-53 (1998) (describing such aggregates).

240. See 28 U.S.C. § 1350 (2000), first enacted in 1789. Compare Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) with Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

241. See Declaratory Judgments Act of 1934, Ch. 512, 48 Stat. 955, now codified at 28 U.S.C. § 2201 (2000) (authorizing federal courts to issue declaratory judgments establishing “the rights and legal relations of any interested party seeking such declaration” in “a case of actual controversy within its jurisdiction”). Noncompliance permits a court to order “further necessary or proper relief.” 28 U.S.C. § 2202 (2000).

242. See Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 73 (1917). In England, a provision enacted in 1873, described as a major reform over prior practice, authorized courts to make “binding declarations of right whether any consequential relief is or could be claimed.” *Id.* at 74.

243. *Id.* at 69-70. Another advocate was Professor Edwin M. Borchard, who also championed enactment of a federal declaratory remedy. See Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform, Part I*, 28 YALE L.J. 1 (1918); *Part II*, 28 YALE L.J. 105 (1918); Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793 (1932).

244. Sunderland, *supra* note 242, at 89.

245. Congressional enactment came after the Supreme Court had, through case law,

statute does not, on its face, answer the question posed by *Great-West*. Could a court in an ERISA case provide declaratory relief as a form of "appropriate equitable relief"? Ought the response be negative, given that in other statutes, Congress has listed declaratory relief as a part of equitable relief<sup>246</sup> but has not done so for ERISA? Or because declaratory relief came into vogue in England in the nineteenth century and not in the eighteenth? Or because "declaratory relief is neither legal nor equitable, but sui generis"?<sup>247</sup>

The problem of characterizing declaratory relief is not novel.<sup>248</sup> For example, after the enactment of the 1934 Declaratory Judgment Act, judges faced the issue of deciding when jury decision making was required.<sup>249</sup> In the 1960s and early 1970s, civil rights litigators facing statutory requirements of three-judge courts if seeking injunctions against state statutes based on federal constitutional law<sup>250</sup> often argued that, by requesting declaratory relief, they had avoided the need for that special form of a court. Similarly, some jurists, seeking to limit the reach of doctrines prohibiting federal courts from enjoining ongoing state proceedings, have detailed differences between declaratory and injunctive orders.<sup>251</sup> Now, given *Grupo Mexicano* and *Great-West*, the incentives may shift. If declaratory judgments are a form of equity, it could be a source of additional power for federal judges. On the other hand, declaratory relief is not itself supposed to be a source of federal subject matter jurisdiction, which might prompt some to interpret it as a form of a remedy at law.<sup>252</sup>

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signalled an openness to upholding its constitutionality. See *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933) (concluding that the Constitution did not require a "case or controversy" to be "presented by traditional forms of procedure, invoking only traditional remedies"). See generally Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 560-72 (1989) (discussing the legislative history). The provision has repeatedly been read not as a font of jurisdiction but to define remedies available if jurisdiction is otherwise proper. See *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). The federal act followed that of many states. See generally *Introductory Notes to UNIF. DECLARATORY JUDGMENTS ACT*, 12 U.L.A. 309-12 (1996 & Supp. 2002).

246. See, e.g., 8 U.S.C. § 1252(e)(1)(A) (2000) (providing for limited judicial review such that courts may not "enter declaratory, injunctive, or other equitable relief" other than as specified for aliens).

247. Edwin M. Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 38 (1934). See S. REP. NO. 73-1005 (1934).

248. Nor is the issue only one faced by federal courts. State courts have also variously characterized declaratory relief, sometimes describing it as a form of equity and other times as a legal remedy. See generally Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900-1997*, 47 AM. U. L. REV. 1131, 1144-45 (1998) (detailing some of the variation).

249. See *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 528 (1959) (holding that a request for declaratory relief cannot divest a litigant of rights to a jury trial); *United States Fidelity & Guaranty Co. v. Koch*, 102 F.2d 288, 295 (3d Cir. 1939) (requiring a jury trial).

250. See 28 U.S.C. §§ 2281-82 (repealed in 1976).

251. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 462-73 (1974).

252. When the Declaratory Judgment Act is read against the background of a rule requiring

## 6. Congressional Responses

A more general issue is what kinds of interventions Congress—if it had the interest and political will—could make.<sup>253</sup> One response, akin to the Declaratory Judgment Act, would be to instruct federal courts that, in cases in which jurisdiction exists, they have the power to issue all forms of relief, whether at law or in equity. Another, specific to the ERISA context, would be to state that reimbursement or restitution, whether characterized as a legal or equitable remedy, is available for all or a subset of ERISA claimants. Proposals to amend ERISA have yet other formulations. One would authorize courts to provide “such additional relief as a court of equity might have awarded in a case involving the enforcement of the administration of a trust.”<sup>254</sup> Another would be more expansive, replacing the provision of ERISA referring to “other appropriate equitable relief” with the phrase “other appropriate relief, including such relief as a court of equity might have awarded in a case involving the enforcement or administration of a trust, other equitable relief, compensatory relief, or remedial relief.”<sup>255</sup>

But, were Congress to so state, would the Court defer? A central tenet of the new Fourteenth Amendment jurisprudence is that Congress now lacks the unfettered power to fashion remedies.<sup>256</sup> Despite congressional findings, the Court takes it upon itself to assess legislative records to make an independent evaluation of whether a proposed remedy is proportionate to the injury and appropriate in scope. Were Congress to craft statutory remedies and group them under a heading called equity, would the Court defer completely? Perhaps so. In *Grupo Mexicano*, the majority said it would leave “any substantial expansion of past practices to Congress.”<sup>257</sup> But could a litigant challenge congressional power to change historical equity practices by arguing that

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federal question statutory jurisdiction to turn on a “well-pleaded complaint,” the Court has adopted an approach of evaluating which litigant would have filed what complaint for affirmative relief in federal court. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-12 (1983). But see *Doernberg & Mushlin*, *supra* note 245, at 547-72 (arguing that the Court has misread the legislative history of the Declaratory Judgment Act and that it was intended to bring certain excluded litigants, including those raising federal defenses, into federal court).

253. Proposals to amend ERISA have faced complicated interest group politics. As to the likelihood of political mobilization to obtain responses in general, see Tushnet, *supra* note 15, at 56-63. Others argue for imposition of limitations on the Supreme Court’s powers to invalidate statutes. See Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L.J. 73 (2003) (recounting the history of efforts by Congress to impose supermajority requirements on Court rulings); Jed Handelsman-Shugerman, *A 6-4 Rule: Reviving Consensus and Deference in the Supreme Court*, 37 GA. L. REV. (forthcoming 2003).

254. See The Employee Pension Freedom Act of 2002, H.R. 3657, 107th Cong., § 403(c) (2002) (proposing to amend 28 U.S.C. § 1132(a)(3)(5) by inserting that phrase after the provision to provide “equitable relief”).

255. See Retirement Security Protection Act of 2002, S. 1919, 107th Cong., § 403(a) (2002).

256. See Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001).

257. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999).



Congress cannot intrude on the inherent powers of courts over equity?

Prior to enacting any of the proposed forms of legislation, however, Congress would have to take into account a different response from the judiciary—one proffered *ex ante*, while bills are pending. Indeed, before any judges had ruled in *Great-West* on the availability of relief and hence on ERISA jurisdiction, the federal judiciary, qua judiciary, had expressed opposition to affording relief in federal court to certain kinds of ERISA claimants. In its 1995 Long Range Plan, the Judicial Conference of the United States had recommended to Congress that “[t]he jurisdiction of the federal courts to adjudicate routine claims for benefits under ERISA employee welfare benefit plans should be abolished, except when application or interpretation of federal statutory or regulatory requirements are at issue.”<sup>258</sup> *Great-West* accomplished such a result for a different set of ERISA claimants<sup>259</sup> and warned others that federal power may not be available to help them. More generally, the federal judiciary has actively opposed the creation of a host of other federal remedies, as is discussed in Part III, below.

### *C. Impoverishing the Job of Judging*

The Chief Justice has been a leader in bringing the problem of judicial compensation to the forefront.<sup>260</sup> He—and many other federal judges—worry that the salaries of federal judges are too low when contrasted with their peers in private practice. The Chief Justice has argued that these salaries harm judicial morale.<sup>261</sup> I use

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258. LONG RANGE PLAN, *supra* note 5, at 35, reprinted in 166 F.R.D. 49, 95 (1995) (Recommendation 12(b)).

259. The issue in *Great-West* was remedies under § 502(a)(3) of ERISA. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 206 (2002). The Long Range Plan’s reference to benefits due would relate to claims brought under § 502(a)(1). See LONG RANGE PLAN, *supra* note 5, 166 F.R.D. at 95-96.

260. William Rehnquist, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2002), available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (commenting that judicial salaries are negatively affecting the pool of candidates interested in judgeships by skewing towards more individuals coming from the public sector and fewer from the private sector). See also FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM (The American Bar Association & The Federal Bar Association eds., 2001); 1999 JUDICIAL CONFERENCE REPORT at 19 (recommending legislation to raise salaries of judges, as well as other federal officials). Social scientists may well debate the causes for shifts in patterns of routes to judgeships; salaries are one of many variables to be analyzed. See Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience (and its Consequences for the U.S. Supreme Court)*, 91 CAL. L. REV. (forthcoming Jan. 2003).

261. See Linda Greenhouse, *Pay Erodes, Judges Flee, and Relief Is Not at Hand*, N.Y. TIMES, July 17, 2002 at A14 (discussing the appearances of the Chief Justice and Justice Breyer before the National Commission on the Public Service, at which they expressed concerns about the number of federal judges who have left the bench). They provided information on federal judicial pay falling below levels of pay to law professors and judges in Canada and England. See also *Williams v. United States*, 240 F.3d 1019 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 1221 (2002). Article III judges were plaintiffs in that action; they had relied on a 1989 statute, the Ethics Reform Act, and the compensation clause of Article III to argue that the congressional failure to provide automatic salary increases for judges between 1995 and 1999 was

the term “impoverishing” in the title of this section to refer to that ongoing discussion as well as to suggest that rulings such as *Grupo Mexicano* and *Great-West* impoverish the job of judging in another way—by undermining the sense of utility of federal judges.

Imagine oneself a trial judge faced with a claimant whom one knows to be legally entitled to funds. Imagine oneself confident that the funds will not be available by the time a final decision is made. Indeed, as the application is made to stop the assets from being dissipated, the debtor offers no defense.<sup>262</sup> Assume that such a judge hews to congressional mandates but that the case involves no statute to interpret, or that a relevant statute provides for legal relief but makes no mention of other remedies. Under English law, a response—subject to appellate review—is possible, explained as necessary because

We live in a time of rapidly growing commercial and financial sophistication and it behooves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case.<sup>263</sup>

But for a United States federal judge, such adaptation is not permitted.<sup>264</sup> Presiding in such cases becomes frustrating. Similarly, imagine oneself a judge who believes that a mistake, identified before entry of final judgment, has occurred but the time stated in a federal rule for lawyers to object has passed. Federal trial judges have been told they lack power to intervene to rectify such errors. No longer do such judges retain the “error-correcting power that is ‘inherent in every court of justice so long as it retains control of the subject matter and of the parties.’”<sup>265</sup> Judges have either to tolerate their own inability to be effective or to attempt, through off the record negotiations, to get litigants to agree to do what law cannot require them to do.<sup>266</sup> If achieving such results through settlement, reviewing courts cannot assess whether judges were functioning as “loyal agents” or “cooperative partners” with Congress.

This constrained understanding of adjudication's potential is at odds not only with trends in other common law countries but also with developments in both state and federal systems. Statutes, rules, and practices today focus on “alternative dispute

unconstitutional. The Court denied certiorari, over a dissent from Justice Breyer, joined by Justices Scalia and Kennedy. *Id.* at 1221-1228.

262. See *Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., dissenting) (describing the concerns of the trial judge that the debtor was using court process to delay entry of judgment and gain the time to dissipate assets owed to the creditor). At the hearing on December 19, 1997 on the motion to freeze assets, the trial judge asked: “why is that equitable?” See Transcript of the Hearing, in Petition for Certiorari at Appendix 29a-54a, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (No. 98-231).

263. *Derby & Co. v. Weldon*, 1 All Eng. Rep. 1002, 1007 (C.A. 1989).

264. See the discussion of the *Mareva* injunctions, *supra* notes 126-128 and of *Grupo Mexicano*, *supra* Part II.A.5.

265. *Carlisle v. United States*, 517 U.S. 416, 443 (1996) (Stevens, J., dissenting) (quoting *United States v. Morgan*, 307 U.S. 183, 197 (1939)); see also discussion *supra* notes 99-104.

266. See also Resnik, *Trial as Error*, *supra* note 88, at 943-46 (discussing the other incentives for judges to be involved in settlement efforts).

resolution" mechanisms, through which judges rely on more flexible and informal means to work with parties. The interest in having judges be "problem solvers," coordinating services with other government entities, has resulted in many innovations,<sup>267</sup> sometimes termed "therapeutic jurisprudence,"<sup>268</sup> or "restorative" justice.<sup>269</sup>

The divide between the majority and the dissent in *Grupo Mexicano* and *Great-West* is not only a basic disagreement about the authority of Congress and the national and state governments. As Justice Stevens has described, a "fundamental" disagreement exists about whether judges, working on ordinary cases, retain "the power of a court to correct a miscarriage of justice while it retains jurisdiction over a case."<sup>270</sup> The majority's approach sharply limits the ability of trial judges to use law to respond to the particulars of a case. Much of the debate about judicial role has pitted "judicial activism" against "judicial restraint." But these terms no longer capture the spectrum. Judicial disability better captures the degree to which the strictures of *Grupo Mexicano* and *Great-West* limit judges' efficacy.

### III. BREACHING BOUNDARIES BY CLAIMING POLICYMAKING PREROGATIVES: THE PROGRAMMATIC JUDICIARY

If a basic predicate of such limitations on federal judges is the presumption that federal judges should serve primarily as agents awaiting the signals of Congress, that predicate does not operate to constrain the Rehnquist Judiciary's efforts to influence those signals. In contrast to the disabling approach towards judges in ordinary adjudication, the Rehnquist Judiciary is the engine of its own authority when advising Congress about rightsholding. The Rehnquist judiciary argues that fewer claimants ought to be able to bring disputes to federal courts and, more broadly, that Congress ought to hold a presumption against generating new federal rights if enforced through federal litigation.

I turn now to analyze the statutory sources and practices that have resulted in this other shift in judicial role, this time at the collective level, operating through policymaking organs speaking for the Article III judiciary. I do not argue that the idea of a judge attempting to affect social policy is new. To the contrary, throughout both English and United States history, some judges—as individuals—have tried to use whatever political influence they had, and many have been directly involved in the

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267. See, e.g., Michael Dorf & Charles Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) (describing the creation of "drug courts," linking judicial proceedings to other efforts to wean addicts from drugs so as to break cycles of incarceration).

268. Peggy F. Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

269. See, e.g., JOHN BRAITHEWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002) (discussing developments in Australia and elsewhere). Braithwaite called for institutions such as corporations to provide access to justice programs (not all of which had to be based in courts) and to undertake self-audits to assess the access provided and to monitor the quality of such programs.

270. See *Carlisle*, 517 U.S. at 448 n.8 (Stevens, J., dissenting).

drafting of statutes.<sup>271</sup> Moreover, on a few occasions, Supreme Court justices have banded together to try to persuade Congress to alter their working conditions. For example, in 1792, the Supreme Court justices joined in a petition to Congress to terminate their circuit riding.<sup>272</sup> In the 1920s, justices pressed Congress to revise the Supreme Court docket and shift much of it from mandatory to discretionary review.<sup>273</sup> My discussion, in contrast, is focused on the question of the judiciary as an institution using its corporate voice to advance specific agendas about whether litigants ought to have access to federal adjudication at all.

And, in that respect, the problems explored here are new. Only in the twentieth century did federal judges gain the capacity to function as a cohort and thus have to decide when and how to use a collective voice. Today, the Judicial Conference is comprised of thirteen chief judges of the appellate circuits and the chief judge of the International Trade Court, who gain their authority to serve through seniority,<sup>274</sup> joined by twelve district judges elected from each circuit for terms,<sup>275</sup> and the Chief Justice. That group also relies on many committees, comprised not only of Conference members but of others, selected by the Chief Justice.<sup>276</sup> In earlier days, the Judicial

271. See JAY, *supra* note 81, at 12-22 (discussing English judges); Manning, *supra* note 17, at 44 (quoting Madison's discussion of English judges as "so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote"). See also A. W. B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 599-620 (1975) (discussing the legislative history of the Statute of Frauds); Crawford D. Hening, *The Original Drafts of the Statute of Frauds* (29 Car. II c. 3) and their Authors, 61 U. PA. L. REV. 283 (1913) (reproducing and analyzing the drafts to determine which justices played what role in drafting clauses). For discussion of American judges in the early period, see JAY, *supra* note 81, at 91-105 (detailing Chief Justice John Jay's involvement in the Washington administration). For more recent history, see EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 201-16 (2000) (discussing Felix Frankfurter's activities).

272. See Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 333-34 (1987) (describing the justices' petition as focused on the practical difficulties of the travel). Holt noted that the petition did not suggest specifically how to alter the system. He saw the system of riding circuit as a means to save money by economizing on the number of judges needed to staff the courts while bringing a federal presence to various parts of the country. *Id.* at 340.

273. The effort, popularly known as "The Judges' Bill," was pressed by William Howard Taft, as Chief Justice, and supported by other members of the Court. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1661-1704 (2000) (describing Taft's designation of Justices Day, Van Devanter, and McReynolds to draft the bill; the pursuit of its enactment; the testimony of several justices; and Taft's lobbying efforts). Members of the Supreme Court also prepared an analysis of the bill, introduced it into the congressional record, and claimed their authorship, albeit also noting that drafting was undertaken at the request of Congress. *Id.* at 1675-77.

274. 28 U.S.C. § 331 (2000).

275. The term is for "not less than 3 successive years nor more than 5 successive years." *Id.*

276. See THE JUDICIAL CONFERENCE OF THE UNITED STATES AND ITS COMMITTEES 2 (Sept. 15, 1998) (on file with author) (stating that the "Chief Justice has sole authority to make committee appointments"); *id.* at 10 (listing several standing committees, on which all circuits are normally

Conference sometimes polled circuits or judges before taking public positions.<sup>277</sup> While some vetting of issues through the committee structure continues, the twenty-seven members of the Conference now vote to determine positions for the Article III judiciary, comprised of more than 1200 life-tenured judges and about 800 judges without life tenure.<sup>278</sup> Below, I examine the statute creating the Conference and the

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represented and on which committee members presumptively serve three-year terms, as well as other committees, including the Executive Committee and the Budget Committee, on which "members serve at the pleasure of the Chief Justice"). See generally Alan Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge*, 1 CONSTITUTIONAL COMMENTARY 57 (1984) (discussing the Chief Justice's competing time commitments and the breadth of his authority).

277. This practice was termed the "Phillips Plan" after Orie Phillips, the judge who initiated it. See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 248-54 (1973) [hereinafter FISH, *POLITICS OF ADMINISTRATION*]; 1945 JUDICIAL CONFERENCE REPORT 6-7 (Sept. 1945) (detailing one such poll). That practice developed in response to the distress of district judges, then excluded from membership in the Conference but affected by its decisions. In 1957, district judges gained membership on the Judicial Conference. See Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476. Thereafter, the Conference noted that it no longer needed to poll district judges. See 1958 JUDICIAL CONFERENCE REPORT 275 (Sept. 1958) (formally rescinding the Phillips Plan).

An explanation of the format of footnote references to the Judicial Conference Reports is in order. The Conference initially met once yearly, sometimes had special sessions, and now generally meets twice annually. Over the last eighty years, the publication of its reports has taken different forms. Initially, the reports were reproduced in other legal journals and forwarded to Congress with materials from the Attorney General. Later, the reports were published in conjunction with the Report of the Director of the Administrative Office of the United States Courts. More recently, many reports are available on the website of the United States Courts. Over the years, and depending on the form of publication, the titles of the reports have also varied somewhat.

Were conventional "Bluebooking" employed, the continuity of reporting would be confused by references to the slightly different titles and institutional authorship. To avoid such confusion, I have adopted a uniform template—listing the year of a report, the title Judicial Conference Report, the pages at which specific references appear, followed by the month and the year. Further, given the frequency of references to these works with essentially the same titles, no *supra* or *infra* references are made.

278. For data as of 1999 on the composition of the judiciary, and specifically, the numbers of active and senior Article III judges and bankruptcy and magistrate judges lacking life-tenure, see Resnik, *Inventing the District Courts*, *supra* note 236, at 613-16. Neither bankruptcy nor magistrate judges hold positions on the Judicial Conference, although they often serve on committees of the Conference. In 1978, when Congress revised the charter for the bankruptcy courts, it had provided bankruptcy judges with a seat on the Judicial Conference. See Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 208, 92 Stat. 2549, 2660 (amending 28 U.S.C. § 331 to provide that in addition to a district judge from each judicial circuit, "two bankruptcy judges" would also sit on the Judicial Conference and further that the "bankruptcy judges to be summoned shall be chosen at large by all the bankruptcy judges. Each bankruptcy judge chosen shall serve as a member of the conference for three successive years . . ."). Subsequently, the Supreme Court held that the 1978 revisions had given too broad a jurisdiction to bankruptcy judges. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). When Congress replaced the 1978 statute, it did not include provisions for bankruptcy judges to serve on the Judicial Conference. See Bankruptcy Amendments and Federal Judgeship

topics that the Conference has put on its agenda.

*A. The Statutory Parameters*

In 1922, Congress created the forerunner of today's Judicial Conference by requiring the Chief Justice to chair an annual conference composed of appellate judges from each circuit and charged with assessing dockets and proposing means to respond to congestion.<sup>279</sup> The innovation of what was called the Conference of Senior Circuit Judges (and was later renamed the Judicial Conference of the United States) was coupled with authorization for an additional twenty-two district court judgeships, a significant increase in the size of the federal trial bench, then numbering 105.<sup>280</sup>

As the legislative report for the statute explained, the problem was "congestion"—spawned by Prohibition and by the enactment of new federal laws dealing with crimes related to drugs, espionage, car theft, and income tax evasion.<sup>281</sup> An ad hoc commission of three judges and two United States Attorneys, convened through the Department of Justice, had proposed that Congress create eighteen "judges at large," able to move to different districts "to assist resident judges in disposing of the arrears of business."<sup>282</sup> Chief Justice William Howard Taft was an enthusiast (and source) of that proposal,<sup>283</sup> but members of Congress were not. The legislature chose instead to create specific district court judgeships while reserving the possibility of leaving

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Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

279. See 1922 Judgeship Act, *supra* note 4.

280. See *Additional District Judges for Certain Districts, Etc.*, H.R. REP. NO. 482, to accompany H.R. 9103, at 2 (67th Cong., 1st Sess., Nov. 17, 1921) [hereinafter '1921 House Report on Judgeships].

281. *Id.*

282. *Id.* at 4 (referring to the "voluntary commission" consisting of district judges J.E. Sater, John C. Pollack, W.I. Grubb, and of United States Attorneys William H. Hayward, M.F. Clyne, aided by George E. Strong, a special assistant to the Attorney General, who served as the commission's secretary). The Commission's report is at Appendix D, *id.* at 18-21. Given the variation from district to district in volume, the report preferred a means by which to provide "general relief throughout the entire country" rather than adding judges to particular districts. *Id.* at 18. The commission distinguished among the sources of congestion. Some were structural, such as increases in population and a changing economy, while others were seen as an artifact of specific laws, such as Prohibition. The commission saw an at-large system as particularly useful for the "existing temporary excess of business." *Id.* at 18.

283. Chief Justice Taft provided an initial draft of the legislation. See Walter F. Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. POL. 453, 455 (1962). Thereafter, Taft testified in support of the bill at the Judiciary Committee. See *Additional Judges, U.S. District Courts; Hearings on S. 2432, 2433, 2523 Before the Senate Comm. on the Judiciary*, 67th Cong. at 11 (1921). See also ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1921 at 3-4 (describing the proposal as stemming from the Commission "in cooperation with the Chief Justice of the United States and myself"). Under one version of an at-large scheme, the Chief Justice would have had power to dispatch judges as needed. See William Howard Taft, *Adequate Machinery for Judicial Business, Address Before the Judicial Section of the American Bar Association* (Aug. 30, 1921), in 7 A.B.A. J. 453, 454 (1921).

subsequent vacancies unfilled.<sup>284</sup>

Through that legislation (and here forwarding the goals of Chief Justice Taft),<sup>285</sup> Congress also provided a means of transferring judges from one district to another. The statute required the Conference of Senior Circuit Judges to "prepare plans" for judicial reassignments "where the state of the docket or condition of business indicates the need."<sup>286</sup> To enable the Conference to do so, Congress obliged senior district judges to provide information on "the number and character of cases on the docket, the business in arrears, and cases disposed of," as well as to make "recommendations as to the need of additional judicial assistance for the disposal of business" during the coming year.<sup>287</sup> Congress instructed the Chief Justice, the only member from the Supreme Court and the Conference's presiding officer, to convene annual meetings and specified both time and place.<sup>288</sup>

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284. 1922 Judgeship Act, *supra* note 4, § 1 (creating specific judgeships rather than judgeships at large). *See also* 1921 House Report on Judgeships, *supra* note 280, at 5 (explaining that additional judges should be assigned to particular districts and that judges should be residents of those districts). *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 234-45 (1927); Murphy, *supra* note 283, at 458 (describing how a proposal for judges "at large" would have upset patronage arrangements).

285. *See* William Howard Taft, *Attacks on the Courts and Legal Procedures*, 5 KY. L.J. 3, 14-15 (1916) (discussing the need for either the "Chief Justice, or a council of judges appointed by him, or by the Supreme Court, to consider each year the pending Federal judicial business of the country and to distribute Federal judicial force of the country through the various district and intermediate appellate courts"); *see also* William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601 (1922); William Howard Taft, *Three Needed Steps of Progress*, 6 A.B.A. J. 34 (1922). As noted, the legislation was not identical to that which Taft had sought; he had wanted the power to direct the assignment of new judges and to have them float from district to district as needed.

The Senate passed the Act, as it emerged from conference, with 32 voting in favor and 16 opposed. The House enacted the measure by a vote of 139 in favor and 78 in opposition. *See* 62 Cong. Rec. 12248-49 (Sept. 8, 1922); 62 Cong. Rec. 12365-66 (Sept. 11, 1922). Opponents worried about Congress giving judges the power to make assignments of judges. One legislator objected at length to the bill's proposed investiture of executive power in the Chief Justice and argued it raised serious problems of constitutionality. *See* 62 Cong. Rec. 4853-63 (March 31, 1922) (statements of Senator John K. Shields of Tennessee). Some of the opposition to the bill may have been prompted by opposition to giving Taft the power to assign judges to particular districts. Interest in limiting his power was, in turn, influenced by debates about Prohibition, which Taft favored and some senators opposed. *See* DAVID H. BURTON, WILLIAM HOWARD TAFT: IN THE PUBLIC SERVICE 125-27 (1986).

286. 1922 Judgeship Act, *supra* note 4, § 2.

287. *Id.* But district judges were reassured that it was "not intended that such conference should result in any mandatory interference with the district courts, nor pursue any inquisitorial course but to consider certain reports as to the state of the business in the various districts." 1921 House Reports on Judgeships, *supra* note 280, at 3. Further, the Chief Justice did not have complete control over assignments. *See* FRANKFURTER & LANDIS, *supra* note 284, at 239-40.

288. 1922 Judgeship Act, *supra* note 4, § 2 ("It shall be the duty of the Chief Justice to summon to a conference on the last Monday in September, at Washington . . . or at such other time and place . . . as the Chief Justice . . . may designate."). Judges were allowed their "actual expenses of travel and . . . subsistence, not to exceed \$10 per day." *Id.* This micromanagement

As transcripts of the early meetings of the Judicial Conference record, at the yearly conference, each senior circuit judge commented, district by district, on whether particular judges were sufficient to the task of handling their allotted cases.<sup>289</sup> Thereafter, the Conference generated a brief, annual report, provided by the Attorney General to Congress along with the Department of Justice's annual compilation of statistics on federal filings.<sup>290</sup> The transcripts of the Conference reveal a group of jurists diligent in detailing each district's work and reflective about what the Conference might appropriately do through its newly generated corporate voice. Recall that during the Conference's early decades, the federal judiciary was often criticized, particularly by Progressives, who perceived the federal bench to be hostile to labor and protective of corporate interests.<sup>291</sup> Some members of Congress proposed divesting or limiting federal jurisdiction. One suggestion was to abolish diversity jurisdiction altogether.<sup>292</sup> Frustrations with the Supreme Court's rulings also led to proposals, called "court-packing" to change the number of justices.<sup>293</sup>

In the early 1930s, Conference members discussed whether the group ought to address the specific question of a proposal to strip the federal courts of diversity jurisdiction. The minutes record discussion of the impropriety and ill-advisedness of taking such a position. As Chief Justice Charles Evans Hughes put it, to record opposition would be to put judges in a "very vulnerable position" that would "weaken . . . their prestige, and their independence, if they appeared to be campaigning in their own interests."<sup>294</sup> While urging individual judges to enlist bar associations to oppose

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stemmed in part from concerns that the meetings were an excuse for trips to Washington. See Norman J. Padelford, *The Federal Judicial Conference*, 26 AM. POL. SCI. REV. 482, 485 (1932).

289. Transcripts of the proceedings are at the National Archives in Washington, D.C. See Record Group (RG) 116, Entry 4, *Records Related to Judicial Conference Meetings, 1922-1958* [hereinafter *Judicial Conference Meeting Records*]. Another source for the exchanges within the Judicial Conference is the history written by Peter Fish. See FISH, *POLITICS OF ADMINISTRATION*, *supra* note 277, at 56-57.

I have reviewed materials from 1925 until the early 1940s, when stenographic minutes were either no longer made or archived within that set of papers. The first transcript dates from 1925 and the last from 1941. Another set of minutes (rather than transcripts), beginning in 1953 and ending in 1967, can be found in the Earl Warren Papers in the Library of Congress.

Reports of Conference Committees provide additional insight into the meetings. Committee records are also at the National Archive, RG 116, Entry 5, *Records Relating to Judicial Conference Committees, 1940-1955* [hereinafter *Judicial Conference Committee Records*]. In addition, many of the reports of the committees of the Conference are available at the library of the General Counsel's Office of the Administrative Office of the United States Courts. When I cite to materials from that collection, I refer to them as *Judicial Conference Committee Reports/AO Collection*.

290. Between 1923 and 1929, for example, each annual report was about ten pages.

291. See PURCELL, *supra* note 271, at 64-91.

292. See *Hearings on S. 937, S. 939, and S. 3243 Before Subcomm. of the Senate Comm. on the Judiciary*, 72nd Cong. (1932).

293 See FISH, *POLITICS OF ADMINISTRATION*, *supra* note 277, at 112-24 (commenting that the creation of the Administrative Office in 1939 was a partial response to improve the morale and image of the federal judiciary).

294. 1932 Transcript at 241-42, in *Judicial Conference Meeting Records*, *supra* note 289, Box 8.



the proposal, the Chief Justice opposed collective action, and none was taken.<sup>295</sup>

What prompted that decision? Members of the Conference may have read its statutory mandate as limited to inquiry into workload, judgeships, and dockets, or they may have thought it impolitic at the time to assume a great license. We know that at least some question about the proper scope of their role existed. Conference members decided to ask Congress to revise the statutory charge to authorize it to do more than consider "congestion in the courts and the remedies for it."<sup>296</sup> As Conference reports explained, clarification of the legislation would have been desirable "to avoid any question as to the scope of authority which the Congress intended to confer."<sup>297</sup> Therefore, repeatedly in the early 1930s, the Conference requested that the Attorney General to recommend to the Congress that the Conference have the power to address "changes in statutory law affecting the jurisdiction, practice, evidence, and procedure of and in the different district courts and circuit courts of appeals as may to the Conference seem desirable."<sup>298</sup>

Whether those requests stemmed from a legal judgment about the statute's strictures or a political judgment that it would be wise to elicit signals about congressional receptivity to the Conference taking up more topics is unclear. Political sensitivities surely were at work. Chief Justice Hughes's reference, quoted above, about judicial vulnerability might be read to mean that taking a position, particularly if unsuccessful, would be harmful or might unleash opposition. After all, only a few years earlier, in debates about whether to create a conference for judges, opponents in Congress had warned that such a conference would enable the federal judiciary to become a "propaganda organization for legislation for the benefit of the Federal judiciary," and that such a "self-seeking" institution would enable the judiciary to "perform a legislative function" that would undermine the legitimacy of the federal courts.<sup>299</sup> The

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295. Other judges agreed. See comments of Judge Alschuler at 1932 Transcript, 237A, in *Judicial Conference Meeting Records*, *supra* note 289.

The judges had a different attitude toward individual efforts. See Minutes of 1922 Meeting 10-11, in *Judicial Conference Meeting Records*, *supra* note 289, at Box 1 (Dec. 1922-Sept. 1923) (indicating that then Chief Justice William Howard Taft, concerned about the need for reform of the Supreme Court's docket, urged that each judge be given a copy of then pending legislation and "write personal letters advocating . . . passage to members of the House and Senate"). No official action was taken. See 1922 Judicial Conference Report, published under the title *The Federal Judicial Council*, 2 TEX. L. REV. 458, 459 (1924). See also BURTON, *supra* note 285, at 129-130 (describing what he termed Taft's personal "lobbying" efforts against limitations on diversity jurisdiction).

296. See Transcript of 1930, at 304, in *Judicial Conference Meeting Records*, *supra* note 289, at Box 6 (Oct. 1929-Oct. 1930), Folder entitled "1930 Minutes and Transcript with Index."

297. 1931 JUDICIAL CONFERENCE REPORT 12 (Sept. 1931).

298. 1930 JUDICIAL CONFERENCE REPORT 8 (Sept. 1930); 1931 JUDICIAL CONFERENCE REPORT 12 (Sept. 1931); 1932 JUDICIAL CONFERENCE REPORT 12 (Sept. 1932). The suggestion for this language is detailed in the minutes of the 1930 Transcript, *Judicial Conference Meeting Records*, *supra* note 289, at 322.

299. See Statement of Mr. Lea, 62 CONG. REC. 202-03 (Dec. 10, 1921); Padelford, *supra* note 288, at 482. Clarence Frederick Lea, a Democrat from Northern California, served thirty-two years in the House. He was known as one of the authors of the Pure Food and Drug Act, and of the legislation creating the Civil Aeronautics Authority, and as an opponent of the Electoral College. In some of the elections, he had the nomination from both the Democratic

Conference's repeated requests in the early 1930s for a wider charter were not enacted, and by 1934, Chief Justice Hughes suggested that the Conference "say nothing more about it."<sup>300</sup>

On a few occasions thereafter, Congress returned to amend the statute creating the Judicial Conference and to pass new legislation related to judicial organization. In 1937, Congress included the United States Court of Appeals for the District of Columbia as a member of the Judicial Conference.<sup>301</sup> A brief report accompanying that amendment explained that, because the Conference has been "helpful in expediting and simplifying court business" and "undoubtedly improved trial court procedure and expedited the hearings and trials of cases," adding a representative for the D.C. Circuit was sensible.<sup>302</sup> Two years thereafter, Congress minimized the role of the Department of Justice in administering the courts by creating the Administrative Office ("AO") of the United States Courts.<sup>303</sup> The judicial branch thereby gained a mechanism to do its own data collection and budget preparation.

In 1948, as part of a general revamping of Title 28 (the Judicial Code), Congress made more edits to the Judicial Conference statute, recodified at 28 U.S.C. § 331. Congress changed the name to the Judicial Conference of the United States, linked membership to the status of chief judge (obtained through seniority), deleted details on scheduling of meetings, and added a new sentence providing that the "Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."<sup>304</sup> The legislative history described revisions of Title 28 in general as stylistic rather than substantive, aimed at ending needless searches into the Statutes at Large, eliminating anachronistic provisions, and simplifying language.<sup>305</sup> As to the specific rewording of the section on

and Republican parties. See *Clarence Lea, 89, Served in House*, N.Y. TIMES, June 22, 1964 at 27.

300. See Transcript of 1934, at 134, in *Judicial Conference Meeting Records*, *supra* note 289, at Box 10.

301. See Act of July 5, 1937, Pub. L. No. 179, ch. 426-27, 42 Stat. 848.

302. See S. REP. NO. 75-3, *Providing Representation of United States Courts of Appeals for the District of Columbia on Annual Conference of Senior Circuit Judges*, at 2 (1937) (also noting that the Conference debated "rules of practice and procedure and other like matters tending to expedition and simplification"). See also H.R. REP. NO. 75-163 at 2-3 (1937) (attaching a letter from Attorney General Homer Cummings, forwarding the recommendation from the Judicial Conference that its charter be amended to include a judge from the D.C. Circuit).

303. See Act of Aug. 7, 1939, ch. 501, § 302, 53 Stat. 1223, 1223 (codified at 28 U.S.C. § 601-13 (2000)). See generally THE HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY (Cathy A. McCarthy & Tara Treacy eds., 2000) [hereinafter AO HISTORY].

304. Act of June 25, 1948, ch. 15, § 331, 62 Stat. 902.

305. See REVISION OF TITLES 18 AND 28 OF THE UNITED STATES CODE: HEARINGS ON H.R. 1600 AND H.R. 2055 BEFORE SUBCOMM. NO. 1 OF THE HOUSE COMMITTEE ON THE JUDICIARY, 80th Cong. at 3 (1947) (statement of Rep. Edward J. Devitt, from Minnesota and a member of the House Committee). Some commentators disagreed. See Charles Alan Wright, *Foreword to LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE, JUDICIARY AND JUDICIAL PROCEDURE* (Roy M. Mersky & J. Myron Jacobstein eds., Gaunt & Sons, U.S. Government Documents, 1971) (describing the Code as providing "answers to some problems . . . but creating many

the Judicial Conference, the Revisor's Notes addressed decisions to omit certain details on when and where the Conference met. The Notes also explained that the sentence, quoted above, charging the Chief Justice with reporting to Congress was added "to authorize the communications to Congress of information which now reaches that body only because [it is] incorporated in the annual report of the Attorney General."<sup>306</sup>

Since then, Congress has made a few other changes to Section 331. In 1957, Congress provided for one district judge from each circuit to become members of the Conference.<sup>307</sup> In 1958, Congress authorized the Conference to carry on "a continuous study of the operation and effect" of procedural rules.<sup>308</sup> In 1980, Congress brought the Conference into the process of disciplining federal judges.<sup>309</sup> Amendments to the 1938 Rules Enabling Act, which provides for the Supreme Court to promulgate federal procedural rules, are also relevant. In 1988, Congress required that the Conference's committees (which propose and draft rules) open their meetings and records to the public and also gave the Conference the power to abrogate local rules inconsistent with national rules.<sup>310</sup>

Under the terms of the statute today, Congress requires the Judicial Conference to:

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riddles of its own" and describing the Reviser's Notes as evidencing that he was "wholly unaware of the significance of what he was doing") [hereinafter LEGISLATIVE HISTORY OF TITLE 28].

A major focus of the hearings was the proposed inclusion of the Tax Court within Title 28 and a provision—added in the House—to permit nonlawyers to appear before it. Proponents cited the practice of accountants appearing before the then Board of Tax Appeals; opponents argued the superiority of lawyers and the power of courts to determine who appeared before them. *See Hearings Before a Subcomm. of the Comm. on the Judiciary*, U.S. Senate, 80th Cong., 2d Sess. on H.R. 3214, Apr. 22-24, 26, and June 7 (1948) at 15-16 (statements of Chauncey W. Reed, and Edward Devitt); at 167 (statement of W.A. Sutherland, American Bar Association).

306. Revisor's Notes, LEGISLATIVE HISTORY OF TITLE 28, *supra* note 305, at A 1, A 45.

307. Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476. *See also* H.R. Rep. No. 172, *Providing Representation of District Judges on the Judicial Conference of the United States*, to Accompany H.R. 3819, 85th Cong., 1st Sess. at 2 (Feb. 27, 1957) (explaining that, given that "many of the recommendations of the Conference deal with judicial matters handled daily in the district courts," those judges should be included because they were a "valuable source of information" on "the problem of court congestion and delay in litigation"). In 1996, Congress amended the provision to create terms of not less than three nor more than five years and to permit senior as well as active judges to serve. Act of Oct. 19, 1996, Pub. L. No. 104-317, 110 Stat. 3857.

308. Act of July 11, 1958, Pub. L. No. 85-513, 62 Stat. 497. Congress also charged the Conference with recommending changes to procedural rules "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." Further details of how to do so were provided in the 1988 Amendments to the Rules Enabling Act, Pub. L. No. 100-702, 102 Stat. 4642, codified at 28 U.S.C. §§ 2072-74 (2000).

309. Pub. L. No. 96-458, 94 Stat. 2040 (1980), codified at 28 U.S.C. § 372 (also providing that, if the Conference chose to create a standing committee to deal with discipline and disability, as per 28 U.S.C. § 372(c), the Chief Justice would select its members and that such a committee as well as the Conference would have the power to take testimony and subpoena witnesses).

310. Act of Nov. 19, 1988, Pub. L. No. 100-702, § 401-02, 102 Stat. 4650.

make a comprehensive survey of the condition of the business in the courts of the United States and prepare plans for assignment of judges to or from circuits where necessary . . . [and to] submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business, . . . [and to make] an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.<sup>311</sup>

What then has Congress asked the Judicial Conference to do? Interpretive choices and ambiguity rest on the relevance of original legislative intentions and of legislative records. In 1948, when the language was added directing the Chief Justice to forward legislative recommendations to Congress, did it refer back to the original 1922 focus on assessing dockets and the need for judgeships? Did that text ratify practices as they had developed by 1948? Or, did the text license a new range of activities? As I detail below, under the guidance of a series of chief justices, interacting with changing configurations of presidencies and congresses, the Conference has taken various stances on those questions.

### *B. Practices and Politics*

In the early decades, the Conference focused primarily on workload. The Conference made several requests to Congress, first conveyed by the Attorney General and then directly, asking for legislation to create more judgeships.<sup>312</sup> Aware of the need to persuade Congress of needs for more numbers, the Conference supported its views through collection of information on filings and evidence of judicial efforts to be efficient.<sup>313</sup> To do so, the Conference relied on committees, both standing and ad hoc,<sup>314</sup> focused on particular issues such as statistics or the pretrial process.<sup>315</sup> Over time, the Conference came to worry that it asked for judgeships too often and at points—such as election years—not conducive to obtaining political assent. To be more effective, the Conference developed a system of weighting cases and tried to issue requests for more judgeships at specified intervals.<sup>316</sup>

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311. 28 U.S.C. § 331 (2000).

312. See, e.g., 1934 JUDICIAL CONFERENCE REPORT 5 (Sept. 1934) (urging, “in accordance with its previous recommendations,” that situations in New York and California be “promptly relieved by providing for the necessary number of judges to dispose of the business of these highly congested districts”).

313. See, e.g., *id.* at 2-5 (describing the problems with and efforts to reduce congestion).

314. See Memorandum of the Judicial Conference’s first two meetings convened on December 28, 1922 and September 26, 1923, 1923 JUDICIAL CONFERENCE REPORT 2 (on file with the author) (listing committees, including a “Committee on Need and Possibility of Transfer of Judges” and committees focused on rules and procedures for district judges as well as for bankruptcy, equity, and appellate procedure), also published at Appendix, *The Federal Judicial Council*, 2 TEX. L. REV. 458-63 (1923-24).

315. See FISH, POLITICS OF ADMINISTRATION, *supra* note 277, at 269-73.

316. The Conference developed a means of “weighting” the burden of different kinds of cases. See Report of the Committee on Judicial Statistics 3-8 in *Judicial Conference Committee Reports/AO Collection*, *supra* note 289, Binder Sept. 1955, Vol. II, Item 16; Minutes of the Meeting of the Statistics Committee (June 10, 1952) in *Judicial Conference Committee Records*, *supra* note 289, at Box 9; Report of the Study of Relative Weight to be Given to

In brief summary, as the decades unfolded, the Conference was actively involved in requesting judgeships, monitoring caseloads by improving data collection, securing funding for its operations, law libraries, and benefits for its employees, expanding its role in making rules of practice and procedure for the federal system, and developing training and education sessions for judges. The Judicial Conference also took up other questions, such as courthouse construction, juror qualifications, and criminal justice administration (including supervision of the Department of Probation, the incarceration of youthful offenders, the development of federal public defender services, and procedures for habeas corpus filings).<sup>317</sup>

But the archival materials and the published reports of its meetings during the 1920s through the 1960s demonstrate an ongoing self-consciousness about what questions were properly before the Conference.<sup>318</sup> In the early 1930s, Chief Justice Hughes noted that the one could interpret the enabling statute to make the Conference a “considerable force in the field of legislation,” but he also warned that the Conference had to “keep clear of any questions of policy.”<sup>319</sup> And, in the minutes and reports, one frequently finds the comment that certain issues are “matters of policy” to be left to legislative decisionmaking.<sup>320</sup>

Of course, the central question is to determine which issues raise “questions of policy” left to Congress and which fall within the Conference’s ken. Different methods of analysis and answers are plausible. One approach could be predicated upon efforts to interpret the statutory charter. For example, one could adopt a view, consistent with the current Supreme Court’s majority discussion in *Great-West*,<sup>321</sup> that statutes—if silent on an issue—ought to be read to preclude a particular action. Moreover, Congress, when delegating rulemaking powers to the federal courts, warned the judiciary not to use “practice and procedure” to “abridge, enlarge, or modify any substantive right.”<sup>322</sup> Given the absence of specific direction by Congress to the Conference about what kinds of legislation to propose, coupled with that statute’s references to a “comprehensive survey of the business in the courts” and management and procedure, Section 331 could be read to direct the corporate judiciary to propose legislation only about new judgeships or the internal practices and court procedures. Further, were one an interpretivist guided by legislative history, one would draw

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Different Types of Cases, *id.* at Box 43 (Sept. 1947); Report of the Committee on Statistics, *id.* at Box 46 (Sept. 1948-Mar. 1949). Citing the time lag between requests for judgeships and their being filled, the Conference switched from a four-year to a two-year cycle in 1977. See 1997 JUDICIAL CONFERENCE REPORT 6.

317. See AO HISTORY, *supra* note 303, at 21-66.

318. See Resnik, *Trial as Error*, *supra* note 88, at 959-65 (describing committee reports, minutes of meetings, and annual reports).

319. Transcript 252-53 (1931), in *Judicial Conference Meeting Records*, *supra* note 289, at Box 6 (Oct. 1929-Oct. 1930) (Folder 1930 Minutes and Transcript with Index).

320. See, e.g., 1953 JUDICIAL CONFERENCE REPORT 14 (Spec. Sess., Mar. 1953) (in some versions, reprinted as an Appendix at 231) (noting that a proposed application to military personnel of a law on fugitives from justice “raises an important question of legislative policy for the determination of the legislation branch of the Government and upon which the Judicial Department should not express an opinion”). Other examples are provided below. See *infra* notes 342-51.

321. See *supra* Part II.B.

322. 28 U.S.C. § 2072(a)-(b) (2000).

meaning from the limited focus of the original 1922 enactment as well as from the narrow stated purpose of the 1948 revisions. Because proposals to broaden the charter were made but not enacted, the text and legislative history could be read to authorize the Judicial Conference to work only on staffing and process.

But others might interpret the statute differently—by noting the indeterminacy of the reference to “legislation” and by pointing to other enactments that provide a role for the Conference in procedural rulemaking and that oblige it to do so in a public fashion. Given the words “recommendations for legislation” and the means for public input on rulemaking, perhaps the Conference has been delegated a broad range of questions, limited only by a requirement that an issue relate to the federal courts. That interpretation requires facing the question of what, if any, constraints ought to stem from within the judiciary, determining to limit itself either because of its own conception of role, fears of generating negative responses, or concerns that a too-expansive reading might result in an unconstitutional delegation of power.

Another way to reason about the statute’s meaning is to look at practices under it over the last eighty years. Through analysis of behavior, one could extract implicit judicial interpretations of the charter, as well as congressional toleration, encouragement, or ratification of specific Conference practices. To do so requires both cataloguing the issues and determining how to decide whether a particular question is or is not part of the “business in the courts.”<sup>323</sup> As several decisions interpreting the Rules Enabling Act illustrate, problems emerge about when to characterize a question as administrative or procedural and when to consider a problem substantive. Many issues are both procedural and substantive, in that important matters of social policy are frequently expressed through decisions about process.<sup>324</sup>

Here, I will focus not on the borderline but on questions readily understood as substantive. Specifically, I examine Judicial Conference responses to proposals for congressional enactment of new civil causes of action. Further, my interest is not whether Congress asked for commentary by the judiciary—which it does sometimes but not always.<sup>325</sup> Rather, the question is how the judiciary shaped its own practices about when to voice approval or disapproval of proposed new causes of action that would permit litigants not otherwise before the federal courts to bring lawsuits.

Before embarking on this analysis, I should note that other topics merit inquiry, including the allocation of cases within the federal courts,<sup>326</sup> as well as the allocation

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323. I explore some of these issues in Judith Resnik, *Programmatic Judiciary*, 74 S. CAL. L. REV. 269, 291-93 (2000) [hereinafter Resnik, *Programmatic Judiciary*].

324. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); John Ely, *The Necklace*, 87 HARV. L. REV. 753 (1984).

325. See, e.g., 1952 JUDICIAL CONFERENCE REPORT 28 (Spec. Sess. Mar. 1952) (noting the Conference’s distress that, on several occasions, the Congress had considered matters “in which the Judiciary had a very vital interest” without obtaining input from the Conference). The kinds of matters were not specified. See generally Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1196 (1996) [hereinafter, Geyh, *Redefining the Judiciary’s Imperiled Role*] (describing how the judiciary “professes” never to speak about pending legislation outside annual conference reports except at the request of a member of Congress).

326. As noted *supra* note 279, in 1922-23, the Conference considered the question of the docket of the Supreme Court. Chief Justice Taft was a major proponent of shifting that Court’s

of cases between federal non-Article III courts (such as administrative agencies) and the Article III judiciary.<sup>327</sup> Moreover, commentary aimed at augmenting staff, adding judges, and the like also has political implications. And the longstanding attitude of judges to think themselves policymakers on detention, incarceration, and prisons is another subject area worthy of exploration.<sup>328</sup>

Diversity jurisdiction is yet another example, which does not fit squarely within the focus on new federal civil causes of action, yet has been an important source of access to the federal courts, which once had lawmaking power in diversity cases. The decision

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jurisdiction towards cases chosen from certiorari petitions, and he and other justices helped to draft the legislation. How to characterize what, if anything, the Judicial Conference did, is a question. According to the report of the meetings, "[w]hile no formal action was taken by the conference with regard to these bills, the consensus of opinion was that the changes therein provided for were advisable and should be put into effect." *Memorandum of first two meetings, 1922-23, supra* note 314, at 2, 2 TEX. L. REV. at 459. One could read this description as evidence of the Conference's self-restraint in using its collective voice or as evidence of its willingness to state a "consensus" of support about legislation that would affect whether certain litigants had access, as of right, to the Supreme Court. Further, the Conference's position might also have been understood to be irrelevant in that the pressure to shift the allocation of cases within the federal courts and to remove many cases from the Supreme Court's mandatory docket came from the Supreme Court justices themselves as a cohort. *See supra* notes 283, 285.

327. As to the question of specialized courts and the allocation of cases between agencies and courts, initially, the Conference was leery of remitting litigants to non-Article III courts. For example, in the 1940s, the Conference objected to proposals to shift work to "railroad courts." *See* 1941 JUDICIAL CONFERENCE REPORT 8 (Sept. 1941). The Conference also objected to suggestions to create a general Administrative Court. *See* 1949 JUDICIAL CONFERENCE REPORT 20-22 (Sept. 1949). But in the 1950s, the Conference also became more protective of its own dockets. For example, the Conference objected to proposals to shift complaints of unfair labor practices from the NLRB to the district courts. *See* 1954 JUDICIAL CONFERENCE REPORT 33 (Sept. 1954); 1955 JUDICIAL CONFERENCE REPORT 276 (App., Spec. Sess., Mar. 1955).

More recently, the Conference has become a major proponent of shifting cases, when possible, to non-Article III courts. For example, 1995, the Conference endorsed the placement of more federal benefit litigation in non-Article III tribunals. *See* LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 94 (1995) (Recommendation 10: "Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.").

328. The activity of sentencing was once conceived as uniquely the province of the individual judge, who, when acting within the scope of statutes setting very broad parameters, was not required to give reasons for particular sentences. Further, the decisions were generally not reviewable. Sentencing was thus a peculiarly individualized act, for which judges had no obligation of developing common law. Archival materials indicate that judges saw it as their preserve, objecting to proposals including appellate review of sentencing and legislative oversight. But judges were not successful in warding off congressional intervention, and since the 1980s, when Congress enacted the federal sentencing guidelines, a commission sets permissible parameters from which judges can only depart by stating reasons. Sentencing decisions now result from articulated policies that are to be applied across a spectrum of individuals. Criteria focus on the nature of the offense and certain facts about defendants. Not only are trial judges' judgments circumscribed by the guidelines but appellate review is also available to police adherence. Such changes in the practices of sentencing illustrate how issues can shift from being understood as exclusively the subject of case-by-case decisionmaking to the realm of legislative policy.

of *Erie Railroad Co. v. Tompkins*<sup>329</sup> constrained that behavior, and since then, diversity jurisdiction has had more limited parameters. As noted, in the 1930s, the Conference did not take an institutional position opposing proposals to limit federal diversity jurisdiction.<sup>330</sup> By the 1950s, however, the Judicial Conference was proffering a corporate comment, affirming its commitment to this “historic” form of federal jurisdiction,<sup>331</sup> while recommending that Congress increase the jurisdictional amount required and deem corporations citizens of both their states of incorporation and their principal places of business.<sup>332</sup> Further, under the guidance of Chief Justice Warren, the Conference supported a broader inquiry, to be undertaken by the American Law Institute (“ALI”), on the respective charters of the state and federal courts.<sup>333</sup> Describing diversity as the “most controversial” head of jurisdiction, the 1969 ALI Study proposed both its retention but also some curtailment.<sup>334</sup> Not until 1977, under the leadership of Chief Justice Burger, did the Judicial Conference reverse its support for diversity jurisdiction and propose its almost complete abolition.<sup>335</sup>

But for the purposes here, a narrower focus is useful. What injuries ought to be recognized as legally cognizable harms that the most visible judges within our polity ought to address? The Judicial Conference’s positions about admitting or excluding new litigants to the federal courts are readily perceived as high-stakes questions. The phrase “making a federal case out of it,” which entered common parlance during the middle of the twentieth century, expresses popular sentiments about the import of falling within federal jurisdiction.<sup>336</sup> Moreover, historically, the Conference has approached this problem differently, suggesting that judges themselves saw its special

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329. 304 U.S. 64 (1938).

330. See *supra* notes 294-95.

331. See 1951 JUDICIAL CONFERENCE REPORT 27-28 (Sept. 1951).

332. *Id.* See also 1952 JUDICIAL CONFERENCE REPORT 15 (Sept. 1952); 1955 JUDICIAL CONFERENCE REPORT 275 (App., Spec. Sess. Mar. 1955).

333. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1 (1969) (crediting a speech by the Chief Justice in 1959 about the need to assign cases to each system that would be “most appropriate in light of the basic principles of federalism” as prompting its decision to undertake the project). It was also under Chief Justice Warren that the Judicial Conference became more active in opposing specific proposals to vest federal courts with certain kinds of jurisdiction.

334. *Id.* at 3-4. As to federal question jurisdiction, the ALI Study supported altering the removal provision and abolishing the amount in controversy requirement. *Id.* In 1971 the Judicial Conference endorsed legislation implementing some of the ALI proposals. See 1971 JUDICIAL CONFERENCE REPORT 79 (Oct. 1971); 1973 JUDICIAL CONFERENCE REPORT 48 (Sept. 1973).

335. See 1977 JUDICIAL CONFERENCE REPORT 8 (Mar. 1977); see also 1978 JUDICIAL CONFERENCE REPORT 8 (Mar. 1978) (proposing also that, if diversity jurisdiction were retained, new limitations be imposed).

336. See ERIC PARTRIDGE, A DICTIONARY OF CATCH PHRASES 52 (1977) (defining the phrase to mean “Don’t exaggerate the importance of something” and dating it from 1950). A review of data-based court opinions suggests that judges used that phrase in the 1960s and occasionally thereafter. See, e.g., *Braden v. Texas A. & M. Univ. Sys.*, 363 F.2d 90, 93 (5th Cir. 1981) (*per curiam*) (“Just as Section 1983 does not create a cause of action for every state-action tort, it does not make a federal case out of every breach of contract by a state agency”) (citations omitted).



freight. Further, unlike some topics that judges may gain special insight into through doing their daily work,<sup>337</sup> the issue of what new cases should be eligible to become part of that work is not a topic about which they can claim unique knowledge. While judges may have preferences about what kinds of cases they enjoy or find cumbersome and while they may have political or legal views about how a wise legislator ought to allocate federal judicial time, they do not possess factual information about what has yet to come before them.

Turning then to the historical record on whether the Conference ought to take positions, three general responses can be found within the history of Conference practices.<sup>338</sup> A first is to pass—to decline comment on particular provisions because they were a “matter of policy” not proper for the judiciary. That posture was embraced repeatedly for about the first quarter of the Conference’s existence. With the important exceptions of sentencing<sup>339</sup> and habeas corpus,<sup>340</sup> the Conference declined to comment on which litigants ought to be able to be heard by the federal courts.

A second approach is to comment selectively on specific kinds of claims. For example, beginning in the 1950s, the judiciary occasionally argued that particular kinds of cases already within its domain could be shifted to other institutions. The Conference recommended that federal judicial authority over seamen’s wages be

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337. Compare, for example, the question of certiorari jurisdiction to the Supreme Court, revised in the 1920s and discussed *supra* note 273. An argument for judicial participation could rest on expertise. In 1922, the nine members of the Supreme Court had firsthand information about processing cases required to be decided under the mandatory docket. See, e.g., *Procedure in Federal Courts, Hearing Before the S. Subcomm. on the Judiciary*, 68th Cong. 25-27 (1924) (testimony of Justice Van Devanter) (describing the increase in cases, growing from 526 in 1913 to 720 in 1923, as well as how the justices reviewed petitions).

338. Special thanks are owed to Anya McMurray and Anna Rich, who have joined me in reading and rereading Judicial Conference Reports as we developed an understanding of the items on the agenda and of the positions taken.

339. During some eras, sentencing might have been conceptualized as so idiosyncratic as to be drained of qualities of policymaking, but since the sentencing guidelines, it is more difficult to conceptualize sentencing in that fashion. See *supra* note 328. Under Chief Justice Taft’s leadership, the Conference addressed the need for uniformity in sentencing of probation violators. Yet, according to Burton, Taft “was careful of the Constitution and continued to hold that the meetings of judges should be confined largely to ‘an examination of a judge’s capacity to dispose of his caseload.’” BURTON, *supra* note 285, at 128. Also under that rubric came concerns for material provisions for judges, such as the need for district judges to have libraries. *Id.*

340. See, e.g., *A Bill to Amend § 2254, Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. (June 8, June 24, 1955) at 2-11 (statement of John Parker, chair of the Judicial Conference Committee) (objecting that, because of the Supreme Court’s holding in *Brown v. Allen*, 344 U.S. 443 (1953), state prisoners had too much access, resulting in a “flood of applications” to federal courts and causing friction between state and federal courts) [hereinafter, *1955 Habeas Corpus Hearings*]. Thurgood Marshall, then special counsel to the NAACP, took exception to the position, proffered by Judge Parker, that the bills did not pose substantial access problems. *Id.* at 78-81 (testifying that “the net effect of the proposed bill” would be “completely to eliminate the power of Federal courts to entertain habeas corpus petitions filed by State prisoners to test the constitutionality of the State proceedings which have resulted in their conviction of crime”). See also Winkle, *supra* note 24 (discussing efforts of the judiciary to limit prisoners’ access).

reassigned to an administrative body.<sup>341</sup> Further, the Judicial Conference was repeatedly both attentive to and unwelcoming of prisoner petitions.<sup>342</sup> In addition, the judiciary objected to a series of congressional proposals that federal courts become involved in enforcement of state-ordered alimony and child support.<sup>343</sup>

On the other hand, in 1953, when a bill proposed a civil action against those attempting to bribe government employees, the Conference, relying on conclusions of one of its committees, took a different view. The Conference concluded that, because "this bill deals with a subject matter, the creation of a new civil case of action" it involved "the determination of public policy" for the legislature, not the judicial branch.<sup>344</sup> In 1961, when the Bureau of Budget sought comments on pending amendments to the Interstate Commerce Act, the Judicial Conference demurred, noting that the "methods of enforcing" that Act "would appear to involve a question of policy for the Congress and the Executive Branch" and therefore that comment was not "appropriate."<sup>345</sup> In 1963, when new civil rights acts were proposed, the Conference declined to comment on the "general questions of policy involved in the legislation."<sup>346</sup> In 1970, the Conference perceived creation of federal jurisdiction for certain types of consumer class actions to be "primarily a matter of legislative policy."<sup>347</sup>

Under this selective approach, the Conference sometimes opposed and sometimes supported bills granting, divesting, or limiting jurisdiction.<sup>348</sup> Sometimes, the

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341. See 1951 JUDICIAL CONFERENCE REPORT 29-30 (Sept. 1951). As mentioned (*supra* note 332), in that year, the Conference also revisited the question of diversity jurisdiction and recommended its retention, but with an increase in the amount in controversy. *Id.* at 27. See also 1952 JUDICIAL CONFERENCE REPORT 18 (Sept. 1952) (again recommending approval of bills shifting decision making about the disposition of wages and effects of seamen out of federal courts); *id.* at 15 (again recommending some additional limitations on diversity jurisdiction).

342. See, e.g., 1954 JUDICIAL CONFERENCE REPORT 22-23 (Sept. 1954) (circulating a recommendation by a Conference Committee for legislation limiting state prisoners' filings in federal courts); 1955 JUDICIAL CONFERENCE REPORT 271-272 (App., Spec. Sess. Mar. 1955) (reporting that a "large number of judges" expressed unqualified approval of the recommendation by the Conference's committee on limiting filings); 1955 JUDICIAL CONFERENCE REPORT 23 (Sept. 1955) (renewing support for legislation limiting habeas applicants to federal courts); *supra* note 340.

343. See, e.g., 1957 JUDICIAL CONFERENCE REPORT 37 (App., Spec. Sess. Mar. 1957); 1959 JUDICIAL CONFERENCE REPORT 35-36 (Sept. 1959); 1961 JUDICIAL CONFERENCE REPORT 23 (Spec. Sess. Mar. 1961); 1963 JUDICIAL CONFERENCE REPORT 73 (Sept. 1963); 1977 JUDICIAL CONFERENCE REPORT 53 (Sept. 1977); 1981 JUDICIAL CONFERENCE REPORT 64-65 (Sept. 1981).

344. 1953 JUDICIAL CONFERENCE REPORT 14 (Spec. Sess. Mar., 1953) (also printed in some editions of the Report at 232 (App., Spec. Sess. Mar. 1953)).

345. 1961 JUDICIAL CONFERENCE REPORT 79 (Sept. 1961).

346. 1963 JUDICIAL CONFERENCE REPORT 74 (Sept. 1963).

347. 1970 JUDICIAL CONFERENCE REPORT 13 (Sept. 1970). See also *id.* at 78 (declining to comment on consumer protection legislation as it involved "legislative policy on which the Conference should take no action"); 1971 JUDICIAL CONFERENCE REPORT 79 (Oct. 1971) (taking no position on a series of bills as they "involve basically a matter of legislative policy on which the Conference should not express an opinion"); 1973 JUDICIAL CONFERENCE REPORT 48 (Sept. 1973) (declining to comment on proposals for consumers that related to the powers of the Federal Trade Commission and the availability of class actions).

348. See, e.g., 1958 JUDICIAL CONFERENCE REPORT 264 (Spec. Sess. Mar. 1958) (disapproving of a proposal to prevent federal courts from hearing challenges to decisions to bar

Conference proffered as a justification for any comment the impact a bill would have on workload,<sup>349</sup> and sometimes it added a comment on workload while declining to reach the "merits."<sup>350</sup> And, beginning in the 1950s, the Conference started to identify kinds of cases or claimants that it deemed inappropriate, with brief comments that either the cases were wrong for the courts, the courts wrong for the cases, or the kind of filing lacked historical antecedents.<sup>351</sup>

A third option is to have a general approach—either for or against—the creation of federal remedies located in the federal courts. Examples of such a posture are more recent, beginning during the leadership of Chief Justice Warren Burger and coming to fruition under Chief Justice William Rehnquist. Chief Justice Burger initiated the practice of making annual "state of the judiciary" addresses to Congress.<sup>352</sup> During his tenure, the AO also created a subdivision focused on legislative affairs.<sup>353</sup> And, as noted, it was under Chief Justice Burger that the Judicial Conference first advocated abolition of diversity jurisdiction.<sup>354</sup>

Since assuming the position of Chief Justice, William Rehnquist has used the platform provided by the annual address to protest or to warn against congressional provisions of new jurisdiction to the federal courts.<sup>355</sup> During his tenure, the AO began

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a person from practicing law because of "subversive, criminal, or corrupt activities" or "refusal to answer questions in a state judicial, legislative, or executive inquiry").

349. See, e.g., 1977 JUDICIAL CONFERENCE REPORT 53 (Sept. 1977) (citing workload problems when opposing legislation enabling unemancipated minors to have a federal right to support from parents).

350. See, e.g., 1963 JUDICIAL CONFERENCE REPORT 74 (Sept. 1963) (declining to comment on the desirability of enacting new civil rights legislation, and noting that the provisions would increase filings somewhat but that it would "not impose an unreasonable burden on the federal courts"); 1973 JUDICIAL CONFERENCE REPORT 48 (Sept. 1973) (declining to comment on consumer bills because the issues "involved primarily legislative policy upon which the Judicial Conference should not comment, except to urge Congress to consider the impact upon the federal courts which such legislation would have").

351. See, e.g., 1959 JUDICIAL CONFERENCE REPORT 8 (Sept. 1959) (disapproving of a proposal to transfer unfair labor practices from the NLRB to the district courts on the grounds that "it would enlarge the jurisdiction . . . to embrace litigation of controversies of a type and character which the district courts are not organized or equipped to adjudicate and for which there appears no historical precedent"); 1975 JUDICIAL CONFERENCE REPORT 50 (Sept. 1975) (disapproving of legislation that would provide for claims relating to unfair consumer practices and noting that "Congress should be advised that this legislation would alter the fundamental character of the federal courts as courts of limited jurisdiction and that the Conference does not regard the United States district courts as the proper forum for action under such legislation.").

352. See Warren E. Burger, *Chief Justice Recaps, 1995 in Year-End Report*, THIRD BRANCH, Special Issue, Jan., 1996 at 1 (describing Chief Justice Burger's initiation of that practice). Those statements are not official policy of the Judicial Conference.

353. AO HISTORY, *supra* note 303, at 87 (describing the beginnings in 1976 of the Office of Legislative Analyses, subsequently termed the Office of Legislative Affairs).

354. See 1977 JUDICIAL CONFERENCE REPORT 8 (Mar. 1977) (approving legislation to abolish diversity jurisdiction except in narrow circumstances), discussed *supra* note 335.

355. See, e.g., *Chief Justice Rehnquist Reflects on 1994 in Year-End Report*, THIRD BRANCH, Jan. 1995 at 1-4 (reprinting the 1994 speech in which the Chief Justice summarized and explained when he thought judicial comments and proposals were appropriate); *id.* at 3 (describing the Judicial Conference's opposition to health care reforms that would locate too

to provide “judicial impact statements” that predicted what effects proposed legislation would have on the federal judiciary.<sup>356</sup> And, as noted, under his leadership in 1995, the Judicial Conference issued its first-ever Long Range Plan, a document setting forth the judiciary’s “core values and mission”<sup>357</sup> in an effort to establish goals for the future of federal courts and provide “an integrated vision and valuable framework for policy making” for the Conference.<sup>358</sup>

That monograph offered more than ninety specific recommendations and more than seventy “implementation strategies,” endorsed officially by the Judicial Conference, as well as a good deal of commentary, not specifically endorsed by the Conference.<sup>359</sup> As to new federal rights, the Long Range Plan advised against new enactments if accompanied by enforcement in federal court. Specifically, Congress was to be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and to do so only to further clearly defined and justified federal interests.<sup>360</sup> As to what “clearly defined and justified federal interests” included, the Long Range Plan listed cases arising under the Constitution; those that “deserve adjudication in a federal judicial forum” because the states cannot “satisfactorily” deal with them and they involve either “strong need for uniformity” or “paramount federal interests;” disputes about foreign relations, government units or officials as litigants; disputes among states, and disputes affecting substantial international or interstate interests.<sup>361</sup>

No mention was made about the desirability of developing new kinds of federal

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many cases in federal courts and the “considerable sentiment in the federal judiciary . . . against further expansion of federal jurisdiction”) [hereinafter *Rehnquist 1994 Report*]; William H. Rehnquist, *1996 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 1997 at 1, 3 (supporting the proposed statutory limitations on prisoner filings then pending); William H. Rehnquist, *1998 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1999 at 1, 2 (criticizing the “trend to federalize crimes that traditionally have been handled in state courts” as “threaten[ing] to change entirely the nature of our federal system”) [hereinafter *Rehnquist 1998 Report*]. The History of the Administrative Office, which provides an overview, director by director, of the Administrative Office, also commented on the shift in approach under the leadership of the current Director, Ralph Mecham, appointed by the Chief Justice; the report captures that attitude with the title of the chapter, “Better Advocacy of Third Branch Needs.” See AO HISTORY, *supra* note 303, at 151.

356. Given the many variables, the ability to make such assessments has been contested. See CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS: PAPERS AND PROCEEDINGS (A. Fletcher Mangum ed., Federal Judicial Center) (1995).

357. AO HISTORY, *supra* note 303, at 178.

358. See LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 51 (1995) (explaining its purposes in an introductory letter from L. Ralph Mecham, the Director of the Administrative Office of the U.S. Courts).

359. Director Mecham’s letter explained that:

Judicial Conference approval . . . extends only to the 93 recommendations and 76 implementation strategies. All other text in the Plan, including commentary on the approved items, serves to explain the drafters’ reasoning and provide background information but does not necessarily reflect the views of the Judicial Conference.

*Id.*

360. LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. at 88 (Recommendation 6).

361. *Id.*

rights. Rather, in commentary, the Plan counseled that, "[a]bsent a showing that state courts cannot satisfactorily deal with an issue, Congress should be hesitant to enact new legislation enforceable in the federal courts, and should not do so in any event without a concomitant reduction of federal jurisdiction in other areas."<sup>362</sup> And the Plan proposed that "[a]ny new cooperative federal-state program to establish national standards for employee benefits (e.g., health care) should designate state courts as the primary forum for review of benefit denial claims."<sup>363</sup>

In support of its recommendations that Congress ought not lodge enforcement of yet-to-be specified rights in federal courts, the Long Range Plan offered two central rationales. A first, based on a perceived threat to the collegiality and law making abilities of the Article III judiciary, was to keep the number of life-tenured judges down.<sup>364</sup> The demand for more judges came from workload demands, and the Conference proposed fewer cases rather than more life-tenured judgeships. In addition to urging restraint in conferring jurisdiction, the Conference also made specific suggestions about assigning certain disputes to federal agencies<sup>365</sup> and devolving as much as permissible to magistrate and bankruptcy judges.<sup>366</sup> The second reason for declining to create federal rights was explained as stemming from the Conference's understanding of the desirable allocations of power within this federation. The Conference read the nation's Constitution and history as preferring states to the federal government as the primary source of rights and remedies.<sup>367</sup> Picking among competing strands of constitutional theory about state and national governance,<sup>368</sup> the Plan stressed what it termed "the more fundamental constitutional principle that the national government is a government of delegated powers in which the residual power remains in the states."<sup>369</sup>

In sum, over its history, the Judicial Conference has deployed three different

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362. *Id.* at 88-89.

363. *Id.* at 96 (Recommendation 12c) (also recommending that administrative exhaustion be required before filings are permitted in state courts).

364. *Id.* at 77-80 (describing different scenarios of growth and expansion, termed "troubling," and imposing "the greatest loss . . . [to] the notion of courts as collegial bodies").

365. *See, e.g., id.* at 94 (Recommendation 10) ("Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefits or regulatory cases that typically involve intensive fact-finding").

366. *Id.* at 107-09 (Recommendations 21-23) (relating to powers of magistrate and bankruptcy judges and calling for study of the bankruptcy appellate panels and limiting appeals when magistrate judges preside by consent at trials); *id.* at 101 (Recommendation 65) (proposing using magistrate judges to the extent constitutionally permissible).

367. *See id.* at 81-83.

368. As many scholars have discussed, many visions of the proper allocations of state and federal authority exist. *See* Lauren Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841, 841-44, 849-51 (1996) (criticizing the Plan's arguments on federalism to demonstrate that they are neither "historically mandated nor constitutionally required"). *See also* Richard Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1224-25 (1988) (outlining the differing predicates of preferences for state and federal governance and citing an array of Supreme Court decisions supporting each alternative).

369. LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. at 81.

approaches towards commenting on how to shape national policies about creating and enforcing new rights. How might one determine which of these different attitudes is the best interpretation of the congressional mandate to Congress or the best use of the judicial branch's voice? As I read the statute and its history, the basic charter of the Conference remains close to the original charge, focused on judgeships, dockets, and court management. The text and the legislative history of both the initial grant and the amendments broadening the Conference's membership (to include judges from the D.C. Circuit and the district courts) point to a narrow understanding of what Congress meant when referring to the "business"<sup>370</sup> of the judiciary and "legislation dealing with the judiciary,"<sup>371</sup> rather than one encompassing proposed legislation creating causes of action.

On the other hand, Congress has not reined in the Conference when it has moved outside those parameters. Moreover, members of Congress have frequently solicited the Conference's opinion on particular proposals, and many argue that the courts and Congress need to improve their means of communication.<sup>372</sup> Thus, both text and practices permit interpretative choices. My approach comes not only from a view of what constitutes a better reading of the statute, but also from constitutional and political theories about the desirability of separated powers. When attempting to shape its own docket through proposing that some claimants, but not others, hold federally enforceable rights, the judiciary puts its own legitimacy at risk.

#### IV. THE PROBLEMS OF LIFE-TENURED PRINCIPALS

In a recent essay, I offered the term "programmatic judiciary"<sup>373</sup> to capture the current posture of the federal judiciary's leadership, forwarding its vision of what kinds of rights Congress ought to make enforceable in federal courts. Here, I elaborate on some of the problems generated by a programmatic judiciary.

##### *A. Comparing the Judiciary's "Policy Predilection"<sup>374</sup> and Its Judgments*

One concern is that the role of the judiciary as commentator cannot be kept discrete from the role of the judiciary as adjudicator. In the late 1930s, after the Court had come under attack, the Administrative Office was formed.<sup>375</sup> A question emerged about that new office's relationship to the Supreme Court. Some feared that, were all members of the Court to become involved in the administrative apparatus, decisions made at the administrative level would be attributed to the Court. If unpopular or ill-

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370. 28 U.S.C. § 331 (2000).

371. See H.R. REP. NO. 172, *supra* note 307, at 3.

372. See generally JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed. 1988).

373. Resnik, *Programmatic Judiciary*, *supra* note 323, at 283-93. See also Resnik, *Trial as Error*, *supra* note 88, at 1024-31.

374. *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 730 (4th Cir. 1999) (Luttig, J., concurring).

375. See Pub. L. No. 299, 53 Stat. 1223 (Aug. 7, 1939), codified as amended at 28 U.S.C. § 601 *et seq.*

advised, those decisions could tarnish judicial authority.<sup>376</sup> Over time, the Chief Justice became the sole member of the Supreme Court to have the power to appoint and remove the Director of that office.<sup>377</sup> Similarly, associate justices have no official role in the Judicial Conference.<sup>378</sup>

That separation has served to insulate eight justices of the Supreme Court from the work of both the Administrative Office and the Judicial Conference. But the Chief Justice is understood as having a great deal of authority over the administrative wing of the federal judiciary. His power appears secure from intervention by other justices and, thus far, from Congress. Only a few rebellions by lower court Judicial Conference judges against the Chief Justice have come to public light.<sup>379</sup> But the problem of drawing connections between the policy of the Conference and the judgments of the Chief Justice on the Court has not been solved. Indeed, overlap between the views of the Chief Justice and the policies of the Judicial Conference can be found on several issues.<sup>380</sup> The years in which the Judicial Conference has been most active in opposing creation of new civil claims coincide with the years in which the presiding Chief Justice was appointed by Republican Presidents, was himself identified with hesitancy about vigorous federal rights enforcement, and has succeeded in marshalling majorities on the Court to limit federal adjudication.<sup>381</sup>

Further, as the Judicial Conference becomes more active and opines on legislative proposals to create or to constrict rights, commentators can compare advice from the judiciary's administrative component with decisions rendered not only by the Supreme Court but from lower court judges. Maintaining distinctions between adjudication and policymaking becomes difficult, as was discussed in an intriguing exchange between two members (J. Harvie Wilkinson III and Michael Luttig) of the Fourth Circuit, ruling

376. Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 141-42 (noting also Chief Justice Hughes's concern that problems or scandals in any federal court might reflect badly on the Chief Justice if judicial administration were too centralized).

377. See 28 U.S.C. § 601 (describing the Administrative Office, supervised by a "Director and a Deputy Directory appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference").

378. See 28 U.S.C. § 331.

379. See Linda Greenhouse, *Vote Is A Rebuff for Chief Justice*, N.Y. TIMES, Mar. 15, 1990 at A16 (describing the Chief Justice's endorsement of a proposal limiting federal appeals from prisoners on death row and the rejection of his approach by the Judicial Conference and commenting that the disagreement reflected "a deep ideological split within the Federal judiciary, with judges appointed in a more liberal era still holding leadership positions on the lower courts even as the Supreme Court itself [came to be] 'dominated by conservatives'").

380. Compare *Rehnquist 1994 Report*, *supra* note 355, at 2-3 (explaining why he thought judicial commentary on federal rights to be appropriate), and *Rehnquist 1998 Report*, *supra* note 355, at 1-2 (objecting to the federalization of crime and describing the importance of federalism and of state court enforcement of rights) with LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 81-83 (1995) (providing a statement of federalism), and *id.* at 84-88 (opposing the federalization of crime).

381. Moreover, the activities of the Chief Justice and centralization of judicial authority can affect how the Court conceives of and does its work. See Robert Post, *The Supreme Court Opinion as an Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001).

on a question of federal jurisdiction.<sup>382</sup> Both jurists are understood to be sympathetic to limitations on federal power. Both agreed about the substantive outcome in the case—that a federal court ought to stay its hand (under an equitable abstention doctrine known as “*Burford* Abstention”<sup>383</sup>) and defer to state processes. Therefore, they agreed that an injunction against operators of video poker (alleged to have violated federal racketeering and state trade and lottery laws) had to be reversed and the case dismissed from the federal docket.<sup>384</sup>

As the majority decision written by Judge Wilkinson put it, the district court had impermissibly entered the “treacherous waters of state political controversy.”<sup>385</sup> The trial court had erred by “attempting to answer disputed questions of state gaming law that so powerfully impact the welfare of South Carolina citizens.”<sup>386</sup> That judge had interfered with a state regulatory scheme that was at the “heart of the state’s police power.”<sup>387</sup> Invoking *Grupo Mexicano*, the court commented on the specially constrained status of federal equitable powers, invoked by the district court but without a “federal statute [that] expressly authorizes the relief . . . sought.”<sup>388</sup>

While agreeing that *Burford* abstention was proper,<sup>389</sup> Judge Luttig wrote a separate concurrence. He argued that the majority had erred in its overly-expansive explication of the abstention doctrine and in its leveling undeserved “criticism” against the district court.<sup>390</sup> Specifically, Judge Luttig identified the majority’s underlying premise to be “that statutes conferring jurisdiction on the federal courts should be interpreted very narrowly and, correspondingly, prudential exceptions to such congressionally conferred jurisdiction construed very broadly, to the end that federal courts remain tribunals of limited jurisdiction.”<sup>391</sup>

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382. *Johnson v. Collins Entm’t Co., Inc.*, 199 F.3d 710 (4th Cir. 1999).

383. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). That equitable doctrine provides that if an issue involves problems governed by a comprehensive state regulatory and administrative system, federal courts ought to stay their proceedings to avoid disrupting integrated state processes. In subsequent cases at the Supreme Court level, efforts to ground abstention on *Burford* have often been rejected, resulting in a view that the doctrine has limited applications. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-63 (1989).

384. *Johnson*, 199 F.3d at 715 (majority decision); *id.* at 729 (Luttig, J., concurring). The case had been filed by individuals, described as “habitual gamblers,” in state court. Defendants had removed to federal court and, when confronted with a request for injunctive relief, sought abstention. *Id.* at 717-18.

385. *Id.* at 721.

386. *Id.* at 720.

387. *Id.* at 715.

388. *Id.* at 726-27 (explaining that, without “a solid foundation in statute for its remedy and with the substantial risk of compromising the independence of state regulatory policy and efforts, the case was a classic one for exercise of” abstention). The district court had entered a permanent injunction based on its “inherent equitable power.” *Id.* at 718.

389. Judge Luttig’s concurrence saw the question of abstention as much “closer” than did the majority. *Id.* at 732 (Luttig, J., concurring) (noting that the defendants had both removed the case and sought abstention and arguing that the RICO claims, which were arguably “principal claims” raised, could not be assumed to be pretextual).

390. *Id.* at 732-33 (Luttig, J., concurring) (quoting about a dozen examples).

391. *Id.* at 729.



Judge Luttig described this position as "accepted and advanced by many on the bench," as well as "understandable and reasonable given the trend toward federalization."<sup>392</sup> But he described that view as "one of policy, not law itself" and therefore not one that could "permissibly influence our interpretation of statutes or . . . prudential exceptions."<sup>393</sup> Further, he argued, judges ought not construe statutes narrowly or expansively because of their own disagreement with congressional decisions that federal courthouse "doors should be open to such disputes, [for, if] the Congress sees fit to provide citizens with a particular cause of action, then we as federal courts should entertain that action—and unbegrudgingly."<sup>394</sup>

The Luttig concurrence called the majority to task for its "over use of . . . particular rhetorical sound-bites," the consequence of which was that "the court could fairly be seen as having decided this case based solely upon its policy predilections."<sup>395</sup> The concurrence cited an opinion essay, *Fear of Federalism*, written by Judge Wilkinson and published in the *Washington Post* a month before the Fourth Circuit's ruling.<sup>396</sup> The essay criticized congressional grants of jurisdiction that had "invade[d] the province of domestic relations law," which he argued belonged to the states. The reference was to the Violence Against Women Act ("VAWA"), the constitutionality of which was then pending before the Supreme Court.<sup>397</sup> Judge Wilkinson described the "sad linkage of states' rights and racial segregation"<sup>398</sup> but argued that local government, rather than national laws, provided the best hope of diminishing racial and ethnic conflict by fostering civic loyalties through "[m]icro-allegiances."<sup>399</sup> He concluded that the "great contribution of the Rehnquist Court" would be to "change the national attitude toward the rightful role of states."<sup>400</sup>

Judge Wilkinson contrasted the "blunderbuss solutions of a centralized bureaucracy"<sup>401</sup> with local innovations, said to create diversity of policies.<sup>402</sup> Recent

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392. *Id.*

393. *Id.*

394. *Id.* at 729 (invoking and citing Justice Frankfurter, who had been the author of another famous abstention doctrine—*R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941)). Dissenting in *Burford*, Justice Frankfurter commented that, were he a member of the legislature, he might be opposed to diversity jurisdiction, but that, as a jurist, he ought not to abstain. Rather, he "must decide this case as a judge and not as a legislative reformer." *Burford v. Sun Oil Co.*, 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting).

395. *Johnson*, 199 F.3d at 730 (Luttig, J., concurring) (providing, in support of his argument, several quotes from the majority) (emphasis in original).

396. See J. Harvie Wilkinson, III, *Fear of Federalism*, WASH. POST, Nov. 26, 1999 at A45. The *Johnson* decision was issued on Dec. 27, 1999. See *Johnson*, 199 F.3d at 710.

397. See Wilkinson, *supra* note 396, at A45. The Court had agreed to review a Fourth Circuit decision, *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999) (en banc), that had held unconstitutional the civil rights remedy of the Violence Against Women Act. After Judge Wilkinson wrote, the Court affirmed the Fourth Circuit holding that Congress lacked the power to create a civil rights remedy. See *United States v. Morrison*, 529 U.S. 598 (2000).

398. See Wilkinson, *supra* note 396, at A45.

399. *Id.*

400. *Id.*

401. *Id.*

402. Judge Wilkinson did not argue that all problems could be solved by the "atomistic

empiricism undermines his assumption that local decision necessarily engenders diverse responses. One powerful study demonstrates the degree to which a few national and transnational conglomerates provide a great many of the "local" services in states. Examples range from prisons to garbage collection, controlled from state to state by relatively few corporate actors.<sup>403</sup> Others chart the degree to which state judicial elections are also infused with national funds and affected by national campaigns.<sup>404</sup>

But Judge Luttig did not object to his colleague's descriptions as erroneously projecting a pastoral image onto the landscape of federalism. Instead, he warned him against what might metaphorically be described as tipping his hand. Of course, I cannot know of the prior discussions between the jurists nor of the motives of a judge, agreeing with concerns about the harms of "federalization" and on the merits of a case, deciding to write a detailed concurrence, identifying with specificity a dozen or so sentences to which he objected. But I can understand the weight of his concerns. For once the activities of lobbying on jurisdiction are taken into account, the convergence between policy positions and adjudication of a specific case is disquieting.

For example, in the 1995 Long Range Plan, the Judicial Conference argued against the "federalization" of crime,<sup>405</sup> and in the same year, the Supreme Court ruled in *United States v. Lopez* that Congress lacked the power under the Commerce Clause to create a federal crime for possession of a gun within a certain distance of schools.<sup>406</sup> The 1995 Long Range Plan insisted on the primacy of states, and a few years later a majority of the Supreme Court elaborated that premise to craft an expansive view of sovereign immunity.<sup>407</sup>

Similarly, the decision in *United States v. Morrison*<sup>408</sup> was not the first time in which the federal judiciary opined that violence against women was not a problem for

decision-making of the market." *Id.*

403. Joshua Civin, *Outsourcing Federalism: Privatization, Devolution, and the Market for Public Services* (Jan. 2003) (on file with the author).

404. See, e.g., Anthony Champagne, *National Summit on Improving Judicial Selection: Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1405-07 (2001) (detailing ideological interest groups active in contributing to judicial elections in many states); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1424 (2001) (citing races in Texas, Alabama, Michigan, and Ohio).

405. See LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 84-85 (1995) (Recommendation 2) ("In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount."). See also William H. Rehnquist, *Remarks on the Federalization of Crime*, Address to the American Law Institute, May 11, 1998 [hereinafter Rehnquist, 1998 ALI Address] (citing the Long Range Plan and commenting that "recently passed federal legislation, and some currently pending legislation" does not meet the Conference's criteria for when federal criminal legislation was appropriate, and specifically critical of two pending bills on juvenile crime). See generally Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029 (1995).

406. 514 U.S. 549, 559-61 (1995).

407. See *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (developing a new claim that states possess dignitary interests). See also Meltzer, *State Sovereign Immunity*, *supra* note 59, at 1038 n.111 (describing the recent vintage of the view that states possessed "dignitary interests" protected by the Constitution).

408. 529 U.S. 598 (2000).

the federal courts. The Judicial Conference initially opposed creation of a civil rights remedy in VAWA. Projections of filings (subsequently shown to be far off the mark) were submitted to Congress in support of the proposition that the proposed new remedy would be unduly burdensome.<sup>409</sup> Further, the Chief Justice spoke out against that statute after its enactment, when its constitutionality was before the courts. In 1998, in a speech given at the annual meeting of the ALI, the Chief Justice commented on VAWA as well as other federal statutes, all of which he described as inappropriate expansions of federal jurisdiction.<sup>410</sup> He argued that "traditional principles of federalism that have guided this country throughout its existence" meant for such issues to be governed by state law. Rather than a loyal agent of Congress, he questioned the quality of its decisionmaking. "One senses from the context in which [these bills] were enacted that the question of whether the states are doing an adequate job in this particular area was never seriously asked."<sup>411</sup> (In fact, the legislative record of VAWA expressly addressed the problems faced by women seeking protection in state courts from violence and did so by relying, in part, on some twenty reports prepared at the direction of state judiciaries themselves.)<sup>412</sup> As forecast by his earlier statements, in 2000, the Chief Justice penned the majority decision holding the civil rights remedy in VAWA an unconstitutional exercise of congressional commerce and equal protection powers.<sup>413</sup>

### *B. Lobbying the Judiciary*

In addition to weakening the legitimacy of adjudication through active policy pronouncements that suggest decisions stem less from individualized fact finding and application of legal principles than from views held on general policy, a programmatic judiciary becomes an attractive venue for those hoping to influence the judiciary's decisions on what positions to adopt. While classical narratives about the independence of the judiciary presume that threats stem from the executive and the legislature, contemporary discussions need to recognize that repeat player litigants have both interest and means to attempt to influence the judiciary.<sup>414</sup>

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409. The initial opposition included reference to an estimate that, were the Act passed, more than 50,000 cases would be filed annually, some 13,450 of them in federal courts, imposing more than \$62 million in costs and involving thousands of hours of work. See *Violence Against Women: Victims of the System, Hearing on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong. 10 (1991). See generally Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996). Subsequently, the Judicial Conference decided to support educational and other aspects of VAWA and not to take a position on the cause of action. See 1993 JUDICIAL CONFERENCE REPORT 28 (Mar. 1993).

410. See Rehnquist, 1998 ALI Address, *supra* note 405, at 18.

411. *Id.*

412. Those reports are listed in Justice Souter's dissent in *Morrison*, 529 U.S. at 630 n.7.

413. *Morrison*, 529 U.S. at 601.

414. The challenges of how to respond to such interests are evident in a current high-profile issue about whether judges ought to accept paid-for trips (sometimes to pleasant locales) to attend seminars for judges on specific topics, such as law and economics. See William H. Rehnquist, *Remarks at the American Law Institute 4, 5* (May 2001) [hereinafter Rehnquist, 2001 ALI Remarks] (describing the 20/20 television program "about a seminar held last winter

The classical narratives also assume that the only endpoint of efforts to influence judges is obtaining a judgment one desires. But the development of a programmatic and policy-generative judiciary provides another reason: lobbyists seek to affect the

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at a resort in Tucson attended by a number of federal judges"). Funding for such programs often comes from foundations, corporations, or institutes associated with particular points of view.

In 2000, members of Congress proposed legislation to regulate these practices. See Judicial Education Reform Act of 2000, S. 2990, 106th Cong. (2000) (providing that judges not be permitted to accept "anything of value in connection with a seminar" and that the Federal Judicial Center give judges funds only for seminars "conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded Judiciary"). A revised proposal is under consideration. See Statements from Senators John F. Kerry and Russell Feingold, "Judicial Junkets," ABCnews.com (Apr. 6, 2001) available at [http://abcnews.go.com/sections/2020/2020/2020\\_010406\\_judges\\_statement.html](http://abcnews.go.com/sections/2020/2020/2020_010406_judges_statement.html) (commenting that "at the end of the last Congress, we introduced legislation . . . [and hoped] that our bill would finally be enough to trigger action by the Judicial Branch. It was not. We will introduce new legislation . . ."). See also Comments of Senator Durbin on the Nomination of D. Brooks Smith to be United States Circuit Judge, 107th Cong., 2d Sess. 148 Cong. Rec. 7651, 7654 (July 31, 2002) (expressing his concern about "Judge Smith's frequent attendance at judicial seminars sponsored by special interest groups and funded by corporations with litigation pending before his court. Most importantly, he remains unwilling to report the value of those seminars on his financial disclosure forms . . .").

The Judicial Conference and the Chief Justice objected to the legislative proposal. They opposed what they termed the "sweeping restrictions on educational programs," and argued that judicial ethics were not in need of being revisited. Further, they stated that the proposed statutory limits raised "potential constitutional issues, such as imposing an undue burden on speech." Administrative Office of the United States Courts, *Judicial Conference Opposes Sweeping Restrictions on Educational Programs* (Sept. 19, 2000), available at [http://www.uscourts.gov/Press\\_Releases/press09192000.html](http://www.uscourts.gov/Press_Releases/press09192000.html). See also Rehnquist, 2001 *ALI Remarks*, *supra*, at 5-8 (objecting to the legislation); Administrative Office of the United States Courts, *Existing Judicial Ethics Rules Protect Public Interest* (Nov. 29, 2001), available at [http://www.uscourts.gov/Press\\_Releases/ethics.pdf](http://www.uscourts.gov/Press_Releases/ethics.pdf) (describing congressional testimony by the Chair of the Judicial Conference Committee on the Codes of Conduct, appearing before the House Subcommittee on Courts, the Internet, and Intellectual Property, and arguing that existing ethical guidelines exist to inform judges who attend "privately funded educational programs").

The American Bar Association ("ABA") has taken up the question of whether it ought to issue an ethics opinion on the issue. That action inspired opposition from some within the judiciary and has spawned disagreements about the process by which the ABA drafted a preliminary opinion. See Jill Hertz Blaustein, *Turmoil Over Judges' Expense-Paid Travel*, 28 LITIG. NEWS 1 (Nov. 2002) (describing commentary from Marvin Karp who, as Chair of the ABA's Standing Committee on Ethics and Professional Responsibility, defended the ABA, and commentary by the Director of AO, who had written a memorandum objecting to the ABA's "secret activities," argued to have improperly relied on the Community Rights Counsel, an organization that had released a detailed critical report on judicial involvement in seminars); James G. Glazebrook, *Chair's Column*, ABA JUD. DIV. REC., Summer 2002 at 28, 28 (criticizing "[o]rganizations with specialized agendas" for "attacking federal judges" who attend seminars hosted by other organizations, and naming the Community Rights Council and the Alliance for Justice as leading the attacks and The Foundation for Research on Economics and the Environment, George Mason University's Law and Economics Center, and the Liberty Fund of the Manhattan Institute's Center for Legal Policy as the attacked).

judiciary's promulgation of rules and recommendations.<sup>415</sup> Again, the problem is not only theoretical. The degree to which the federal judiciary has come to be understood as a forum for policies on access to the federal courts was vivid in the winter of 2002. A group of lobbyists tried to persuade the Judicial Conference to join efforts to convince Congress to divest state courts of jurisdiction over class actions, arising under state law, but involving large sums of money and defendants doing business on a national scale. The setting was a proposal by an Advisory Committee to the Judicial Conference to amend the federal class action rule. Congress has, since 1988, obliged the Judicial Conference to enable public input on proposed rules,<sup>416</sup> which, as noted, are not supposed to "abridge, enlarge, or modify any substantive right."<sup>417</sup> But, of course, rule changes can have political implications. Thus, the judiciary has the burden of crafting its own rulemaking boundaries.

In 2002, such an effort came from a subcommittee of the Judicial Conference—the Advisory Committee on the Federal Rules of Civil Procedure<sup>418</sup>—which circulated two kinds of proposals on class actions for public comments.<sup>419</sup> The first, a draft rewording of Rule 23, proposed textual amendments aimed at increasing judicial control over attorneys who seek certification of classes and approval of settlements.<sup>420</sup> A second

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415. See generally FIGUEIREDO & FIGUEIREDO, *supra* note 15.

416. See 28 U.S.C. § 2073(a), (c)(1) (2000). Those provisions, part of amendments made in 1988, came in the wake of criticism that the ruledrafting process was too closed. See JACK B. WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES (1977); Howard Lesnick, *The Federal Rule-Making Process: A Time for Reexamination*, 61 A.B.A.J. 579 (1975). Professor Geoffrey Hazard disagreed, arguing that rulemaking did not often involve issues on which identity-groups had views and warning against the politicization of the processes. See Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULEMAKING PROCEDURES (1977)). See generally Robert Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999).

417. 28 U.S.C. § 2072(b) (2000).

418. The body is charged with drafting proposals to be reviewed by a Standing Committee on the Rules of Practice and Procedure and then by the Judicial Conference of the United States. See 28 U.S.C. § 2073(b) (2000).

419. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY, CIVIL AND CRIMINAL PROCEDURE AND THE RULES OF EVIDENCE, REQUESTS OF COMMENT (circulated Aug. 15, 2001) [hereinafter 2001 ADVISORY COMMITTEE DRAFT RULES], available at <http://www.uscourts.gov/rules/proposed021502.htm>.

420. Specifically, the proposal called for judicial selection and appointment of class action lawyers. 2001 ADVISORY COMMITTEE DRAFT RULES, *supra* note 419, at 30-42 (proposed section 23(g)); more judicial control over attorney fees and additional requirements for notice of class certification, *id.* at 39-50. Also proposed is that more detailed information at settlement be given to district judges. *Id.* at 50-69.

The set of proposals offered an interesting effort to respond to many concerns about class actions. I, like many others, thought some of the interventions well advised and suggested a few alternatives. For example, the proposed rule addressed the problem of "side settlements" in which attorneys make agreements for individual clients that differ from those provided for the class as a whole. Such settlements may be used to convince individual objectors not to oppose a proposed settlement. The Advisory Committee draft called for such information to be revealed so that a judge, charged with evaluating a proposed settlement, has relevant information. See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding*

proposal, denominated a "Reporter's Call for Comments," was expressly circulated in a sub-statutory manner<sup>421</sup>—not as a formal rule proposal but rather as a means of eliciting responses. One question it raised was whether federal judges could, through

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*Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2183-85 (2000). See also Testimony of Brian Wolfman, Staff Lawyer, Public Citizen Group, Before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 12-14 (Jan. 22, 2002) (on file with author) (discussing needs for disclosure); Brian Wolfman, Letter of Nov. 23, 1999 to the Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure and to the Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, re: Proposed Amendments to Rule 23(e) Concerning Disclosure and Approval of Side-Settlements (on file with author) (proposing revised language to Rule 23(e) for disclosure of all side settlements, including attorney fee agreements).

Commentators on the proposed draft Rule 23 had a range of views. Some objected that the rulemakers had not gone far enough. See, e.g., Statements of John Bronsteen & Owen Fiss on the Proposed Amendments to Rule 23 11-17 (Jan. 22, 2002) (on file with author) (calling for notice to all members of all classes when certified). Members of the plaintiff bar raised concerns that requiring notice to all classes, at certification, would increase the costs of litigation and deter the pursuit of needed class actions. See, e.g., Memorandum from Bill L. Lee, Partner, Lief, Cabraser, Heiman & Bernstein, to the Civil Rules Advisory Committee 6-7 (Jan. 22, 2002) (on file with author) (describing the costs of litigating a case involving public transportation in Los Angeles and comparing the proposal to current provisions, requiring only that class members be notified if the class is certified as a "B(3)" class, focused on monetary relief).

After these and other hearings on the proposed draft, the Advisory Committee forwarded somewhat modified proposals to the Standing Committee. See Memorandum of David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure 89-247 (May 20, 2002) (on file with author) [hereinafter Advisory Committee May 2002 Report] (also providing summaries of testimony from the hearings), available at <http://www.uscourts.gov/rules/jcoa-2002/cvrules.JC.pdf>. Discussions of the changes made can be found in the May Report. *Id.* at 114-15, 117-24. For details of the sequence of proposed revisions over more than the decade before, see *id.* at 116-17. The commentary on each rule is summarized *id.* at 125-247.

421. When a rule is formally proposed, the Rules Enabling Act requires notice and comment. See 28 U.S.C. § 2071(b) (2000). In contrast, the circulation provided on overlapping class actions was more informal. See Edward H. Cooper, Reporter's Call for Informal Comment: Overlapping Class Actions 1-2 (Sept. 2001) (on file with author) [hereinafter Reporter's Call for Comments] (describing the charge to the Reporter, Professor Edward H. Cooper, by the Advisory Committee to provide an "informal circulation" of possible responses to the "proliferation of competing and overlapping class suits, pending simultaneously in federal and state courts"). The draft, designed to elicit comment, had not been "endorsed by the Advisory Committee," but was to "stimulate discussion" of the "real-world problems" that could or could not be adequately addressed through rulemaking or by less formal judicial means. *Id.* at 5. As the Federalist Society newsletter on the two drafts circulated by the Committee put it, the proposals for notice and comment addressed problems that class members may have with their own attorneys. Concerns about "how best to protect class action defendants from the popular plaintiff tactic of filing virtually identical class action complaints in multiple fora" were in an earlier stage. See CLASS ACTION WATCH: A PUBLICATION OF THE FEDERALIST SOCIETY'S LITIGATION PRACTICE GROUP AND ITS CLASS ACTION SUBCOMMITTEE, Vol. 3, No. 1, Winter 2002 at 1.

rulemaking, gain the authority to enjoin overlapping or competing class actions (including those filed in state courts) to centralize litigation in federal court or whether legislation was required.<sup>422</sup> Ongoing litigation had brought such problems to the fore. Some judges have used the All Writs Act or removal statutes to bring into the federal courts cases filed in state courts. Other judges have declined to do so in light of the Anti-Injunction Act, which counsels against interference with pending state court litigation.<sup>423</sup>

At one hearing held in Washington in January of 2002,<sup>424</sup> some twenty-five people testified before Committee members, a group composed predominantly of federal judges, joined by a state judge as well as a few academics and lawyers.<sup>425</sup> More than half of the witnesses identified themselves as representing institutional defendants (insurance companies, specific corporations, or the defense bar), with a smaller number describing themselves as affiliated with institutional plaintiffs, such as civil rights or consumer groups.<sup>426</sup>

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422. Reporter's Call for Comments, *supra* note 421, at pts. I, II (providing as a possible change a Draft 23(c)(1)(D), permitting a court refusing to certify or decertify a class to "direct that no other court may certify a substantially similar class" unless new law or facts created a new certification question). The draft also included a potential Rule 23(e)(5), under which a refusal to approve a settlement would "preclude any other court" from approving a substantially similar one. An alternative, *id.* at pt. V, considered proposing that the Rules Enabling Act, 28 U.S.C. § 2072 (2000), be amended to permit rulemaking to cover such injunctions; that the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), be amended to permit injunctions in class actions against state proceedings, or that the Full Faith and Credit statute, 28 U.S.C. § 1738 (2000), be amended to make orders refusing to certify classes preclusive in other jurisdictions.

At a conference convened by the Advisory Committee at the University of Chicago in the fall of 2001, a panel of academics discussed these proposals. Several recorded their skepticism about the capacity of the federal courts, through rulemaking, to gain powers to enjoin state class actions.

423. See 28 U.S.C. § 1651 (2000) (All Writs Act); 28 U.S.C. § 1441 (2000) (removal); 28 U.S.C. § 2283 (2000) (Anti-Injunction Act). The Supreme Court has since held that the All Writs Act cannot be the basis for such removal. See *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2002).

424. See Witness List—Civil Rules Hearing, Washington, D.C. (Jan. 22, 2002) (on file with author) [hereinafter Witness List]. See also 2001 ADVISORY COMMITTEE DRAFT RULES, *supra* note 419 (providing for hearings on the civil rules in November in San Francisco, in January in Washington, and in February in Dallas).

425. See Civil Rules Advisory Committee, Minutes, Jan. 22-23, 2002, available at <http://www.uscourts.gov/rules/minutes.htm> (last visited June 21, 2002) (discussing the meeting and the twenty-five witnesses who testified). The Advisory Committee currently includes seven federal judges, a state judge on the Supreme Court of Texas, two academics, three lawyers, a member of the Department of Justice, *ex officio*, an academic reporter, and two judicial liaisons from other conference committees. See *Federal Rulemaking: The Rulemaking Process at* <http://www.uscourts.gov/rules/newrules3.htm> (last visited Oct., 26, 2002).

426. See Witness List, *supra* note 424, (listing testimony by Norman J. Chachkin, Director of Litigation, on behalf of the NAACP Legal Defense and Education Fund, Inc., Leslie Brueckner, on behalf of Trial Lawyers for Public Justice, and Brian Wolfman, on behalf of Public Citizen Litigation Group, as well as testimony from more than a dozen executives and lawyers who in their comments identified themselves as working on behalf of businesses situated as defendants in class actions).

Repeatedly, those identified with the defense said, in essence, that the revised Rule 23 draft was an improvement, in that it would help curb abuses of class actions. But, they argued, the better the federal courts became in constraining misbehaving plaintiffs' lawyers, the more attractive plaintiffs would find state courts. Further, they complained, some state judges were too ready to certify classes and to approve settlements. Such certifications created, in their view, a national problem for various industries and insurers.

These witnesses had a proposed solution: federalize class actions as a means of reining in wayward state court judges and plaintiffs' lawyers.<sup>427</sup> They urged the Committee to support efforts to federalize cases involving state causes of action about consumer rights or tort liability.<sup>428</sup> As one witness put it, "there must be a way to remove multi-jurisdictional class actions to federal court."<sup>429</sup> Several witnesses referred to pending bills (the "Class Action Fairness Act") that would alter standards for diversity jurisdiction to enable removal of state class actions to the federal courts.<sup>430</sup> Some of the witnesses before the Committee had also testified in support of

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427. See, e.g., Overlapping Class Actions: Preliminary Statement of Judith Mintel, Associate General Counsel, State Farm Insurance Companies to the Advisory Committee on the Federal Rules of Civil Procedure 3 (Jan. 22, 2002) (on file with author) [hereinafter Mintel Testimony] ("We believe . . . that it is not possible to deal effectively with the question of overlapping class actions without addressing class action practice at the state court level at the same time."); Robert E. Scott, Jr., On the Subject of the Proposed Amendments to the Federal Rules of Civil Procedure—Rule 23 (Class Actions) 1, 3 (Jan. 22, 2002) (on file with author) (commenting from his own experience and based on input from Lawyers for Civil Justice ("LCJ"), "a national coalition of leading corporate counsel and defense bar organizations" of which he was then president, and urging support of legislation to move cases into federal court); Statement of Linda A. Willett, Vice President and Deputy General Counsel, Bristol Myers Squibb Co., Before the Advisory Committee on Civil Rules 4 (Jan. 22, 2002) (on file with author) ("We . . . urge that the Committee propose preclusion rules or legislation that would work . . . to ensure that the federal courts will be able to effectively and freely exercise their Article III powers.").

428. See generally Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1564 (2000) (discussing the 1999 proposals to "move more state claim based litigation to the federal courts" and objecting to "stripping state courts of their ability to hear class actions involving state law claims").

429. Bruce E. Alexander, Senior Vice President and Litigation Counsel, First Nationwide Mortgage Corp., Rule 23, Federal Rules of Civil Procedure, Proposed Amendments (Jan. 22, 2002) (on file with author).

430. See, e.g., S. 1712, Class Action Fairness Act of 2001, 107th Cong. (2001). Its findings include that abuses of class actions were "keeping cases of national importance out of Federal court" and making judgments of one state's law "bind the rights of the residents" of other states. *Id.* § 2(a)(4). A companion bill was presented in the House. See H.R. 2341, 107th Cong. (2001); H.R. 2341, 107th Cong. (2002) (the Class Action Fairness Act of 2002, which is the same as H.R. 2341). These proposals would amend federal diversity jurisdiction and permit removal of proposed class actions, if "any member of a class of plaintiffs is a citizen of a State different from any defendant" or involves foreigners on either side, and if the matter in controversy exceeds \$2 million. Federal courts would have jurisdiction, unless a "substantial majority of the members of the proposed" class and defendants were from the same state in which the action was originally filed and the claims were governed under the laws of that state, or the proposed class was fewer than 100 people, or the primary defendants were state officials against whom



these bills in Congress.<sup>431</sup>

Their plea to the Judicial Conference Committee was twofold: that the Conference make its own rules to curb class actions, and that it support their efforts in Congress to divest the state courts of jurisdiction over class actions so as to curb powers of state judges.<sup>432</sup> As one witness explained, "the Committee's first action after the conclusion of these proceedings [should] be to fully endorse two bills, pending in Congress, H.R. 2341 and S. 1712, that will ensure that interstate class actions filed in state courts be readily removed to Federal Court."<sup>433</sup>

My point here is not to argue the merits of federalization of these class actions but rather to make plain the political stakes. As Professor Georgine Vairo has explained, the appeal of state court litigation for plaintiffs' attorneys comes in part from a perception that federal judges are hostile to certain forms of litigation and impose more stringent requirements of causation than do some state judges.<sup>434</sup> Defendants share that perception; they hope that, were cases channeled to federal courts, fewer cases would be certified and fewer settlements approved.<sup>435</sup> Opponents of these proposals—including some members of the House of Representatives, dissenting from the version passed by the House—argue that its enactment would "weaken enforcement of laws concerning consumer health and safety, the environment, and civil rights," and would make it "far more difficult for consumers and other harmed individuals to obtain

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federal relief could not run. See H.R. 2341, § 4.

431. See, e.g., *Class Action Fairness Act of 2001, Hearing on H.R. 2341 Before the House Comm. on the Judiciary*, 107th Cong., 18-34 (2002) (statement of John Beisner, Partner, O'Melveny & Myers). See also John H. Beisner & Jessica Davidson Miller, *They Are Making a Federal Case Out of It . . . In State Court*, Civil Justice Report, Manhattan Institute, Sept. 2001, reprinted in *Hearing on H.R. 2341*, *supra* note 430, at 98-144 and in 25 HARV. J.L. & PUB. POL'Y 143 (2002). That journal, which is not funded by Harvard, has been described as the "leading forum for conservative and libertarian legal scholarship." See Christopher C. Posteraro, *Preface*, 25 HARV. J.L. & PUB. POL'Y v (2002) (discussing the journal's founding decades earlier and that it was especially appropriate given that occasion to hold the Twentieth Annual Federalist Society Student Symposium). The prior unnumbered page lists the members of the Board of Advisors and makes the disclaimer as to funding.

432. The degree to which state courts can affect litigants in other states is in part an artifact of federal law. The United States Supreme Court has held that a state court settlement that included state and federal securities claims could be preclusive of subsequent federal litigation, even though the federal securities claims were within the exclusive jurisdiction of the federal courts and the state courts lacked the power to try those claims. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

433. Statement of Lewis H. Goldfarb, Hogan & Hartson LLP, Before the Advisory Committee on Civil Rules 3-6 (Jan. 22, 2002) (on file with the author) (also discussing misuses of class actions and attaching an article by Noam Neusner, *The Judges of Madison County*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 39-40). See also Mintel Testimony, *supra* note 427, at 5 ("[W]e urge the Advisory Committee to express support for such federal legislation, to review the proposed legislation and recommend any changes needed to ensure that it achieves its important goals."); *id.* at 18 ("State Farm urges the Advisory Committee to endorse publicly the concepts in H.R. 2341 and S. 1712.").

434. See Vairo, *supra* note 428, at 1604-05.

435. *Id.* at 1609-25 (discussing the 1999 versions of these bills and exploring their constitutionality).

justice in class actions at the state or Federal level.”<sup>436</sup>

In short, proponents of the legislation have been clear about their goals, understandably focused on protecting their clients’ interests. Yet none expressed hesitancy when requesting that federal judicial committees join them on the quest to federalize this set of cases. Rather, they assumed it possible that the Judicial Conference could be enlisted to support their efforts to take cases arising under state law and move them to federal court.<sup>437</sup>

As of the fall of 2002, the Judicial Conference had not formally responded to the efforts to take up this cause. Its past record on the issue of federalization of class actions is mixed. As noted, in the early 1970s, the Judicial Conference declined to comment on proposals for consumer class actions—classifying such issues as legislative matters for Congress, not the judiciary, to determine.<sup>438</sup> By the 1990s, however, the Conference had begun to offer some views on this issue. For example, for large scale tort claims, the Judicial Conference’s 1995 Long Range Plan supported relaxing diversity requirements in multiparty, multiclaim cases to enable more to be filed in and to stay in federal court.<sup>439</sup> Yet, when worries about computer failures at the dawn of the twenty-first century arose and legislation was proposed—dubbed “Y2K”—to protect consumers, the Conference opposed drafts permitting new federal class action claims. In its view, federal adjudication was not appropriate, given “the objective of preserving the federal courts as tribunals of limited jurisdiction.”<sup>440</sup> In

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436. H.R. REP. NO. 107-370, at 129, 131 (2002) (providing the views of dissenters).

437. A host of potential lobbyists exists, some more likely than others to think the federal judiciary receptive to their point of view. For example, some criminal defense lawyers believe that a national problem exists because of certain forms of unfair treatment of defendants in state courts. Proponents of such views might want a federal judicial committee to change procedural rules on habeas corpus. Past positions taken by the judiciary may make such a scenario unlikely. See Winkle, *supra* note 24 (describing proposals in the 1940s to restrict prisoners’ access); Statements of Judge Parker and Thurgood Marshall, 1955 *Habeas Corpus Hearings*, *supra* note 340 (debating such proposals); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws, The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (describing the interrelationship between the Rehnquist Court’s rulings on habeas that had limited access before parallel but not identical statutory revisions were enacted). But the point here is to understand that many groups could want to enlist judicial support for their positions.

438. See 1970 JUDICIAL CONFERENCE REPORT 13 (Mar. 1970); 1971 JUDICIAL CONFERENCE REPORT 79 (Oct. 1971); 1973 JUDICIAL CONFERENCE REPORT 48 (Sept. 1973); discussion *supra* note 347 and accompanying text.

439. LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 91 n.16 (explaining that while, in Recommendation 7, the Conference supported limiting the cases qualifying for diversity jurisdiction, it also was in favor of expanding diversity in this respect).

440. See 1999 JUDICIAL CONFERENCE REPORT 17 (Mar. 1999) (opposing legislation providing federal jurisdiction); News Release, Administrative Office of the U.S. Courts (Mar. 16, 1999), at [http://www.uscourts.gov/Press\\_Releases/jcc99.html](http://www.uscourts.gov/Press_Releases/jcc99.html) (describing Judicial Conference opposition to bills “expanding federal court jurisdiction over Y2K class actions” because “[f]ederalization of class actions will deprive the judicial system of the contributions that state courts would otherwise make in meeting the substantial burdens that Y2K litigation may impose”). See also Statement of Judge Walter K. Stapleton on Behalf of the Judicial Conference of the United States, *Hearings on H.R. 775, Year 2000 Readiness and Responsibility Act Before the House Comm. on the Judiciary* (Apr. 13, 1999), available at

addition, in the late 1990s, the Conference registered opposition to earlier versions of the 2002 Class Action Fairness Act.<sup>441</sup>

Whether that decision will change is not yet clear. After circulating its informal call for comments about whether judicial rulemakers could deal with overlapping class actions, the Advisory Committee on Civil Rules concluded that using federal procedural rules to make changes to deal with state-based class actions would “test the limits of authority under the Rules Enabling Act,”<sup>442</sup> and suggested legislation as the appropriate route.<sup>443</sup> The Federal-State Jurisdiction Committee of the Judicial Conference, however, has reiterated that opposition to such bills, as the Conference had done in 1999, is desirable.<sup>444</sup>

My concerns, however, do not turn on either the lobbyists’ successes or on the

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<http://www.house.gov/judiciary/stap0413.html> (objecting to the provision of original federal jurisdiction over claims based on state law but noting that the Judicial Conference had supported minimal diversity litigation for mass torts). Congress enacted a version of the legislation, permitting Y2K cases to be filed in state or federal court and limiting the availability of class actions in such cases. See 15 U.S.C. §§ 6601-6617 (1999).

441. See H.R. Rep. No. 107-370, at 123 n.3 (2002) (reporting that “on July 23, 1999, the Executive Committee of the [Judicial] Conference voted to express its opposition to the class action provisions of [the Interstate Class Action Jurisdiction Act of 1999]”). See also Executive Committee of the Judicial Conference, Memorandum of Action (July 23, 1999) (on file with author) (discussing the proposed expansion of federal jurisdiction and noting that, in light of the serious concerns of the various Conference committees, the Executive Committee voted on behalf of the Judicial Conference to express opposition to the bills “in their present form.”). Further, “[t]he Committee recognized the complicated nature of the issues involved in class action and mass tort litigation and encouraged further deliberate study of the areas,” including cooperative work to develop “an alternative approach.” *Id.* See also *Class Action Bill Passes in House*, THIRD BRANCH, April 2002, at 1 (discussing H.R. 2341, The Class Action Fairness Act of 2002, described as “significantly expand[ing] federal jurisdiction in class action cases, thereby sweeping much of this litigation into federal court”; also noting that the Judicial Conference had not yet taken a position on the bills but had earlier opposed similar legislation).

442. Advisory Committee May 2002 Report, *supra* note 420, at 301.

443. While taking no position on the specific pending bills, the Advisory Committee called for a statute to provide “some form of minimal diversity legislation . . . to permit large, multi-state class actions to be brought in—or removed to—federal court.” *Id.* at 301 (explaining that to do so would “avoid or alleviate some of the most severe problems that are engendered by repetitive and overlapping class actions . . . [and would] also further the important principle that in a federal system, no one state’s courts should make decisions that are binding nationwide even as to class members who were injured in the forum state.”). Focusing on “state class actions in which the interests of no single state predominate,” the Advisory Committee requested that the Standing Committee “support the concept of minimal diversity for large, multistate class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states’ jurisdiction over in-state class actions is left undisturbed.” *Id.* at 301-02. See also David F. Levi, Memorandum to the Civil Rules Advisory Committee: Perspectives on Rule 23 Including the Problem of Overlapping Classes (May 7, 2002), attached as an addendum to the Advisory Committee May 2002 Report, at 302-20.

444. Report of the Federal-State Jurisdiction Committee to the Judicial Conference for the meeting of September, 2002, *Judicial Conference Committee Reports/AO Collection*, *supra* note 289, (Sept. 2002) (notes on file with the author).

wisdom of their position. The import of these exchanges rests on the fact that lobbyists went to the federal judiciary to make an argument that the judiciary ought to go to Congress to ask it to redraw jurisdictional lines. Whether the issue is computer failures, health benefits, violence against women, civil rights for African Americans, or consumer class actions, and whether it would be wise or unwise for federal courts to take up these cases, it is for Congress and not the judiciary as a collective to decide. Once the Judicial Conference takes on the role of distinguishing among litigants—arguing against federal jurisdiction for consumers at risk of injury from computer failures but for federal jurisdiction for others—it becomes a place that lobbyists need to be. The judiciary thus reduces its own ability to remain distant from partisanship.

### *C. Distinguishing Forms of “the Judicial Power”*

Institutions are not static, and what judges do has changed over time. Moreover, many countries today—England included—have a judiciary not separate from but working within the executive.<sup>445</sup> While some might try to assimilate the judicial corporate voice into that fold or accept it as an appropriate evolutionary response to changing times, this new role does not easily fit within American conceptions of separated powers, serving both to authorize and to limit judicial power.

Separation of powers marks several concerns. One, expressed through constitutional grants of life tenure and protected salaries, is the need for judges to be free from either executive or legislative encroachment. “Judicial independence” has become a shorthand<sup>446</sup> for the effort to keep federal judges sufficiently insulated from political processes so as to be able to provide disinterested judgments on the conflicts that politics produces.<sup>447</sup> A second concern, less clear from constitutional text but developed early on and now also included under the rubric of separation of powers, is that judges might encroach on executive or legislative prerogatives, thereby interfering with and undermining democratic processes. Discussions of separation of powers thus alternate between worrying about adjudicators overreaching and worrying about other branches of the federal government leaning too hard on judges.<sup>448</sup> Less explored is the

445. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597 (1999).

446. As others have elaborated, judicial independence is a cluster of concerns. *See generally*, JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002); Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535 (1999); Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in Bush v. Gore* (Stanford Public Law and Legal Theory Working Paper Series, Research Paper No. 39, 2002) available at [http://ssrn.com/abstract\\_id=311086](http://ssrn.com/abstract_id=311086).

447. The need to appeal to partisan politics is what critics of elections for judges bemoan. *See* Republican Party of Minn. v. White, 122 S. Ct. 2528 (2002); Charles Gardner Geyh, *Why Judicial Elections Stink* (Summer 2002) (manuscript on file with the author).

448. *See, e.g.*, Geyh, *Judicial Independence, Judicial Accountability*, *supra* note 19; Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001); J. Clifford Wallace, *An Essay on Independence of the Judiciary: From What and Why*, 58 N.Y.U. ANN. SURVEY AM.

question of how collective Third Branch actions outside adjudication might do harm either to other branches or to the judiciary itself.

I share the concern that judges ought to see their charter as bounded, although I also join those welcoming a cooperative dialogue with Congress, through both decisions and discussions.<sup>449</sup> What has developed in the United States under the Rehnquist Judiciary, however, are restrictions on judicial action in individual cases coupled with few boundaries for the Judicial Conference in general policy making. My view is that this formulation has it backwards, in that adjudication has many built in constraints, whereas the more the judiciary becomes generative of policies, the less it will be able to be free from partisanship. Moreover, for separation of powers to work at any level requires insistence on functional distinctions between different branches of government. When judicial advice moves beyond idiosyncratic efforts by individual judges to regular corporate commentary, the judiciary loses more of its unique character. The lines between judicial and legislative decisionmaking become increasingly blurred.

When judges in individual cases shape remedies, they are subjected to several constraints. First, judges who preside are generally assigned through random, computer-based programs. Trial level judges have relatively little ability to forward particular issues over time.<sup>450</sup> Second, those judges are deeply dependent on litigants to develop the analytic predicates to support adjudicated relief. Third, the exercise of power through adjudication requires detailed, sometimes tedious, and labor intensive work, mining records for the requisite facts and reading cases and statutes for the relevant law. Fourth, both litigants and judges have many incentives to avoid that labor by finding mechanisms to settle disputes.<sup>451</sup> Fifth, and especially when ordering equitable remedies, trial level judges are subjected to prompt appellate review; Congress has authorized interlocutory review of preliminary injunctive relief.<sup>452</sup> That appellate process in turn can generate a debate within or across circuits about the propriety of particular rulings. And even when the Supreme Court decides, revision

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LAW 241 (2001).

449. See generally Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61 (examining the Supreme Court's decision in *United States v. Dickerson*, 120 S. Ct. 2326 (2000), and the degree to which constitutional rulings provide subconstitutional remedies); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (examining the role of the Court in announcing rules beyond constitutional requirements); Geyh, *Redefining the Judiciary's Imperiled Role*, *supra* note 325, at 1224-49 (calling for a new institution to enable cooperative work).

450. In a few instances, assignments are not random. See, e.g., 28 U.S.C. § 1407(a) (2000) (providing for the Multidistrict Litigation Panel to consolidate cases pending in different districts but involving common facts before a single judge, whom it selects, for pretrial purposes). Further, trial judges can select the cases in which to write and publish decisions, thereby affecting the shape of the law. In addition, judges who have assumed senior status have some ability to decline certain kinds of cases.

451. See, e.g., Marc Galanter & Mia Cahill, *Most Cases Settle, Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339 (1994); Resnik, *Trial as Error*, *supra* note 88, at 943-49; Kent Stryerud & Sam Gross, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

452. 28 U.S.C. § 1292(a) (2000).

remains available whenever a given opinion fails to convince subsequent justices of its correctness.<sup>453</sup>

In contrast, when judges invoke their corporate voice to advise Congress on whether consumers, tort victims, ERISA litigants, or victims of gender-based violence ought to have access to federal adjudicatory<sup>1</sup> remedies, they have no obvious boundaries nor practices by which to formulate their judgments. And consider the issues at stake. Reflect on the “new” federal rights of the twentieth century—involving labor, securities, welfare, air and water quality, and nondiscrimination. Consider the rights recently at issue, such as a new civil right for victims of gender-motivated violence<sup>454</sup> and a new civil right for family members seeking time away from work to provide care for themselves and others.<sup>455</sup> Think also of rights still in the offing, from a range of proponents and encountering an array of opponents. The list includes proposals for rights against health maintenance organizations and more broadly for health care patients in general,<sup>456</sup> as well as rights for “unborn children” and to enable more religious practice in public settings. The Judicial Conference, on behalf of the Article III judiciary, has sometimes been silent but has sometimes opposed a particular innovation.<sup>457</sup>

453. See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002) (discussing the institutional constraints that affect adjudication).

454. 42 U.S.C. § 13981 (1994), struck in *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

455. See Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 (2000), the constitutionality of which as applied to states is now before the Supreme Court. See *Hibbs v. Nev. Dep’t of Human Res.*, 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom. Nev. Dep’t of Human Res. v. Hibbs*, 122 S. Ct. 2618 (2002).

Some debate the degree to which the Supreme Court’s constitutional rulings of recent years have in fact done much to limit national powers. See Bruce Ackerman, *Off Balance*, in *BUSH v. GORE: THE QUESTION OF LEGITIMACY* 192 (Bruce Ackerman ed., 2002) (arguing that no major statute that would mobilize popular politics has been invalidated); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 866 (2000) (suggesting congressional means by which to regulate commerce in light of that opinion); Tushnet, *supra* note 15, at 55 (“Nothing in the Court’s decisions threatens the core of the expansion of national power that occurred in the New Deal and afterwards, which confirmed that the national government had the power to intervene extensively in the private sector to accomplish national economic goals,” and noting that the national government’s ability to regulate state actors “has been weakened slightly”). For others, myself included, see Resnik, *Categorical Federalism*, *supra* note 14, at 630-42, the limitations have been profound in terms of congressional capacity to generate a range of new rights to redress inequality between women and men. The outcome in *Hibbs* will tell us more.

456. See, e.g., The BiPartisan Patient Protection Act, S. 1052, 107th Cong., (2001), and H.R. 2563, 107th Cong., (2001). The Senate version provided that claims about Health Maintenance Organizations failing to “exercise ordinary care in making a decision” but not involving ““non-medically reviewable”” decisions could, after administrative rulings, be filed in federal court. See S. 1052 § 402(a)(n)(1)(A)(B), (a)(n)(6). The House version permitted patients who had exhausted administrative remedies to sue Health Maintenance Organizations in state courts if injuries occurred from a medical decision and limited the removal of such actions to federal court. See H.R. 2563 § 402 (a)(n)(1)-(3), (a)(n)(16)(b)(1)(e).

457. See *supra* note 409 (discussing the Conference’s initial opposition and subsequent

The life-tenured federal employees who raise their collective voices against new causes of action have neither democratic mandate nor accountability when they attempt to shape social policy through the exercise of non-adjudicatory authority. They are not situated institutionally to weigh the costs and benefits of the generation of new norms or the symbolic import of conferring federal rightsholding status on sets of claimants. Nor can they claim a technocratic advantage; they have no unique knowledge about how the many variables that affect the filing of lawsuits will play out in causes of action not yet in existence.

Moreover, the Judicial Conference, under the Chief Justice's leadership, sets its own agenda. No method is prescribed for gathering the information requisite to making judgment. Some tradition of research, sometimes aided through gathering empirical data, has developed, and a good deal of policy is crafted through committee work. But the Conference is not obliged to poll the hundreds of judges on whose behalf it speaks. No publicly-negotiated rules articulate what falls within the Conference's mandate. Rather, the policy boundaries have been provided by the Conference's own Long Range Plan, which itself has chosen among competing visions particular limits for federal adjudication. No mechanism for review exists, and no means for revisiting earlier decisions is built into the process. Constraints come only from the sensibilities of the life-tenured about their own corporate voice and role in a democratic polity.

Of course, no litigant is bound by statements of the Judicial Conference. Moreover, Congress is free to ignore judicial advice, although it is now hamstrung by constitutional adjudications that—like the Conference's positions—limit federal jurisdiction. But the Judicial Conference has been successful in its efforts to alter specific legislation. Examples include the wording of the Civil Rights Remedy of VAWA in the early 1990s and the decision not to give life tenure to bankruptcy judges in the 1980s.<sup>458</sup> Further, individual judges are discouraged from breaking ranks with official Conference policy,<sup>459</sup> and the policies become an expression of norms of the

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decision not to take a position on the civil rights provisions of VAWA); LONG RANGE PLAN, *supra* note 5, reprinted in 166 F.R.D. 49, 96 (1995) (Recommendation 12(c)) (proposing that any new federal-state programs on health care designate state courts as the "primary forum" for review of denial of benefits); 2000 JUDICIAL CONFERENCE REPORT 8 (Mar. 2000) ("in any managed care legislation . . . the state courts [should] be the primary fora for the resolution of personal injury claims arising from the denial of health care benefits, should Congress determine that such legal recourse is warranted"); 2001 JUDICIAL CONFERENCE REPORT 58 (Sept. 2001) (addressing the Bipartisan Patient Protection Act," expressing "concern" about a new federal cause of action, and encouraging Congress "to provide state courts with jurisdiction (concurrent or otherwise) over any suits to compel insurance plans to provide interim medical benefits on an emergency basis and to bar removal of such suits").

458. See Nourse, *supra* note 409 (VAWA); Countryman, *supra* note 24 (bankruptcy legislation).

459. See, e.g., *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 before the Senate Comm. on the Judiciary*, 101st Cong. 208, 232-77 (1990) (testimony of Richard A. Enslen, United States District Judge, Western District of Michigan) (speaking in favor of S. 2027, about which the Conference had taken a different position). This norm is not codified but noted in discussions by individual judges, deciding if, when, and how openly to be in conflict with either the Conference, the Chief Justice, or personnel at the Administrative Office. Tensions on this issue surfaced during the tenure of one of the Directors of the Federal Judicial Center. Management consultants were

judiciary by which entrants to the federal judiciary are socialized into its ranks. The Conference's positions become an educational vehicle, orienting new members to the norms of the federal judiciary. That institution is now explicitly committed to opposing the generation of new (and yet to be imagined) rights, if enforced through federal jurisdiction.

The judiciary itself becomes seen as a political institution, as another agency in Washington to be targeted by special interest groups. Indeed, as detailed above, the federal judiciary has come to be perceived as sufficiently anti-rights that lobbyists thought it worthwhile to spend time attempting to persuade the Judicial Conference to join them in trying to federalize state-based class actions. Despite all the Conference's general recommendations against new federal jurisdiction and the Court majority's discourse on federalism and its claimed solicitude toward state lawmaking prerogative, lobbyists read the federal judiciary as potentially willing to override state law<sup>460</sup> by urging that state courts be divested of jurisdiction over class actions arising under state law.

Assume that the Judicial Conference itself desires no association with such interests. By regularly rendering opinions on policies about access to federal courts, the Conference cannot avoid being seen as allied with specific political forces. The more active in policy making, the more the Third Branch loses a space apart from politics. Through such decisions, the body politic loses a sector of government that ought, as an entity, to be agnostic (*ex ante*) about when and how to generate new rights so as to be able (*ex post*) to legitimate any of its judgments on whatever choices Congress made.

brought in to review the allocation of authority between these two organizations within the Judicial Branch.

An exchange in the early 1920s on the Judges' Bill (addressing the discretionary jurisdiction of the United States Supreme Court, *see supra* note 273) suggest that, in earlier decades, pressures also existed to go along with policies pressed by Chief Justices. A member of Congress asked Chief Justice Taft if "each individual member of the Supreme Court" favored enactment of the bill. *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States, Hearings on H.R. 8206 before the House Comm. on the Judiciary*, 68th Cong. 6, 29 (1924). Chief Justice Taft replied, "I am told by all the members that I can say that the court is for the bill. There may be one member—I do not think more—who is doubtful about it, or, I should say, doubtful about its efficacy; but he said to me that I could say the whole court was in favor of the bill." *Id.* Professor Hartnett's analysis suggested that Justice Brandeis was the doubter. *See Hartnett, supra* note 273, at 1684-85, 1691.

460. The majority has done so in preemption cases. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (holding, with the majority of five, that Congress, through the Federal Cigarette Labeling and Advertising Act, had preempted Massachusetts regulations relating to outdoor and point of sale cigarette advertising). The four dissenters disagreed "strongly." *Id.* at 591, 605 (Stevens, J., dissenting, joined by Justices Ginsburg, Breyer, and Souter). Not all preemption cases rule that state law remedies are unavailable, nor do all that do find preemption have a majority with the same members. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that the Federal Motor Vehicle Safety Standard, promulgated under the National Traffic and Motor Vehicle Safety Act, preempted a state common law tort action about when obligations to provide air bags in cars arise). In that instance, the majority included Justice Breyer, *id.* at 864, while the dissenters included Justices Stevens, Souter, Thomas, and Ginsburg. *Id.* at 886 (Stevens, J., dissenting). *See also Fallon, supra* note 10, at 471-72.



The new norms of the Rehnquist Judiciary thus do most harm to the federal judiciary itself. In individual cases, its powers have been divested, diminishing the utility of adjudication. And, as the Conference takes up more "legislative policy," its legitimacy as an adjudicator is undermined. As a principal in charge of a corporate agenda, the Article III judiciary ought to become more conservative in its pursuit.